3

FILE COPY

Office Supreme Court, U.
FILED
SEP 24 1934
CHARLES ELMORE CROPL
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1934.

## No. 69

FRED L. FOX, IN HIS INDIVIDUAL RIGHT AND IN HIS OFFICIAL CAPACITY AS TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA, *Appellant*,

v.

STANDARD OIL COMPANY OF NEW JERSEY, *Appellee.*

## BRIEF OF APPELLANT

HOMER A. HOLT,
*Attorney General of West Virginia,*
R. DENNIS STEED,
*Assistant Attorney General,*
WM. HOLT WOODDELL,
*Assistant Attorney General.*
*Counsel for Appellant.*

## SUBJECT INDEX

### Statement


| | PAGE |
|---|---|
| Report of Opinions Below | 1 |
| Jurisdiction | 1 |
| Statement of Case | 2 |
| Disposition by Trial Court | 5 |
| Findings of Fact | 5 |
| Final Judgment | 5 |
| Stipulation of Evidence | 5 |
| Specification of Errors | 12 |
| Summary of Argument | 15 |
| Argument | 22 |
| Point I. Motion to Dismiss | 22 |
| No substantial Federal question because precluded by prior decisions | 23 |
| Classification approved in *Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527, and *Liggett* v. *Lee,* 288 U. S. 517 | 23 |
| Rate of taxation legislative, not judicial question | 26 |
| Point II. | |
| Filling stations and bulk plants of appellee are integrated chain within decisions of *State Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527, and *Liggett* v. *Lee,* 288 U. S. 517 | 27 |

Determination of rate of tax on approved classification is legislative, not judicial question ---------- 35

No showing of confiscation made---------- 38

Relation of tax to purposes of legislature-- 47

Point III. Title of act sufficient under West Virginia Constitution---------- 51

Point IV.

Gasoline and motor oils are merchandise, and bulk plants and filling stations are stores ---------- 53

The agency stations are stores of appellee 66

Bulk plants are stores---------- 68

Points V and VI.

Section 10, Article III and Section 1, Article X of the Constitution of West Virginia do not inhibit classification of subject matter of taxation, and rates legislative question ---------- 69

Double taxation---------- 84

Governmental policy in taxation---------- 90

Conclusion---------- 91

## AUTHORITIES

### Table of Cases


PAGE

Abbott *v.* Steigman, 263 Mass. 585 (161 N. E. 596), at 588 ---- 20, 57

Airway Corporation *v.* Day, 266 U. S. 71 ---- 49

Alaska Fish Co. *v.* Smith, 255 U. S. 44, at 48 ---- 17, 26, 37, 91
at 49 ---- 18

A. Magnano Co. *v.* Dunbar, 2 Fed. Supp. 417, at 419 ---- 18
at 421-2 ---- 82

A. Magnano Co. *v.* Hamilton, Attorney General, 291 U. S. ---; 78 L. Ed. (Adv.) 712, at 714 ---- 37
at 715 ---- 17, 18, 26, 91

Angell *v.* White Eagle Oil & Refining Co., 169 Minn. 183 (210 N. W. 1004), at 187 ---- 68

Austin *v.* Board of Aldermen, 7 Wall. 694 ---- 79
at 698 ---- 17
at 699 ---- 18

Ayres, Ex Parte, 123 U. S. 443 (See Ex Parte Ayres.)

Barnes *v.* Standard Oil Co., 167 Wash. 609 (9 Pac. (2d) 1095), at 618 ---- 68

Bell's Gap R. R. Co. *v.* Pennsylvania, 134 U. S. 232 75

Bent *v.* Weaver, 108 W. Va. 299 (150 S. E. 738), at 301 ---- 20

Best Foods, Inc. *v.* Welch, 34 Fed. (2d) 682, at 686 ---- 18

PAGE

Board of Tax Commissioners *v.* Jackson, 283 U. S. 527 ---------- 23, 24, 25, 27, 32, 83
at 537 ---------- 16
at 541 ---------- 17

Botkin *v.* Welch, (S. D.) 251 N. W. 189, at 214---- 34

Brozka *v.* County Court, 111 W. Va. 191 (160 S. E. 914), at 192 ---------- 20

Buchanan *v.* Louisville Coal and Coke Co., 98 W. Va. 470 (127 S. E. 335), at 472---------- 60

Carley & Hamilton *v.* Snook, 281 U. S. 66, at 72---- 87

Charleston Oil Co. *v.* Poulnot, 143 S. C. 283 (141 S. E. 454), at 291---------- 20, 57

City of Newport *v.* Fitzer, 131 Ky. 554 (115 S. W. 742)---------- 86

City of Troy *v.* Harris, 102 Mo. App. 51 (76 S. W. 662), at 59---------- 20, 56

Clay Products Co. *v.* U. S., 52 Fed. (2d) 1033, at 1034---------- 18

Columbia Gas & Fuel Co. *v.* Public Utilities Commission of Ohio, 291 U. S. ----; 78 L. Ed. 885, at 891---------- 19, 45

Commonwealth *v.* Bibee Grocery Co., 153 Va. 935 (151 S. E. 293), at page 939---------- 18

County of Carter *v.* Sinton, 120 U. S. 517, at 526-- 53

Craig *v.* Pattison, 74 Miss. 881 (21 So. 756), at 884---------- 20, 57

Dayton Power & Light Co. *v.* Public Utilities Commission, 291 U. S. ---; 78 L. Ed. (Adv.) 832, at 843---------- 19, 45

PAGE

De Pauw University *v.* Brunk, 53 Fed. (2d) 647 (Affirmed 285 U. S. 527), at 652 ---- 15

Equitable Life Assurance Society *v.* Hart, 55 Mont. 76 (173 Pac. 1062) ---- 87

Erwin *v.* City of Omaha, 118 Neb. 331 (224 N. W. 692) ---- 81
at 336 ---- 19

Eureka Pipe Line Co. *v.* Hallanan, 87 W. Va. 396 (105 S. E. 506) ---- 72, 84
at 411 ---- 21, 73
at 413 ---- 72, 73, 80

Ex parte Ayers, 123 U. S. 443, at 487 ---- 15

Ex Parte Poresky, 290 U. S. 30, at 31 ---- 16, 23

Ex Parte Young, 209 U. S. 123, at 149 et seq. ---- 15, 22

Federal Trade Commission *v.* Thatcher Manufacturing Co., 5 Fed. (2d) 615, at 621 ---- 46

Finlayson *v.* Shinnston, 113 W. Va. 434 (168 S. E. 479) ---- 66

Fitts *v.* McGhee, 172 U. S. 516, at 525 ---- 15

Fleischmann Co. *v.* Conway, 168 La. 547 (122 So. 845) ---- 81
at 551 ---- 19

Fort Smith Lumber Co. *v.* Arkansas, 251 U. S. 232, at 234 ---- 91

F. W. Woolworth Co. *v.* Harrison, 172 Ga. 179 (156 S. E. 904) ---- 118

Gasoline Co. *v.* St. Louis, 326 Mo. 435 (32 S. W. (2d) 281), at 445 ---- 20, 57

Great A. & P. Tea Co. *v.* Maxwell, 284 U. S. 575 ---- 16, 18, 26, 32, 33

PAGE

Great A. & P. Tea Co. *v.* Maxwell, 199 N. C. 433, (154 S. E. 838), at 440 ---------- 18

Great A. & P. Tea Co. *v.* Morrissett, 284 U. S. 584 ---------- 16, 17, 25, 32, 33

Great A. & P. Tea Co. *v.* Morrissett, 58 Fed. (2d) 991 ---------- 26, 33
at 993 ---------- 17

Gregg Dyeing Co. *v.* Query, 286 U. S. 472, at 480 -- 36

Green *v.* Frazier, 253 U. S. 233,
at 239 ---------- 17
at 240 ---------- 18

Greene *v.* Louisville & I. R. Co., 244 U. S. 499, at 508 ---------- 23

Greene *v.* Spinning, (Mo.) 48 S. W. (2d.) 51, at 57 67

Gulf Refining Co. *v.* Chattanooga, 136 Tenn. 305, 190 S. W. 623 ---------- 86

Gulf Refining Co. *v.* Huffman, 155 Tenn. 580 (297 S. W. 199), at 588 ---------- 68

Gulf Refining Co. *v.* Rogers, (Tex.) 57 S. W. (2d) 183, at 186 ---------- 67

Gunther *v.* Atlantic Refining Co., 277 Pa. 289 (121 Atl. 53) ---------- 61
at 293 ---------- 20, 54

Harvey Coal & Coke Co. *v.* Dillon, 59 W. Va. 605, at 663 ---------- 89

Herkness *v.* Irion, 11 Fed. (2d) 386, at 389 ------ 15, 22

Hope Natural Gas Co. *v.* Hall, 274 U. S. 284 ----- 83
at 289 ---------- 21, 76

PAGE

Hope Natural Gas Co. *v.* Hall, 102 W. Va. 272 (135 S. E. 582)---74, 84
at 275 ---74
at 277-279 ---21
at 278 ---75

Interstate Co. *v.* Richardson, 177 Ga. 9 (169 S. E. 373), at 12---81
at 13---82
at 15---19

J. C. Penny Stores *v.* Mitchell, 59 Fed. (2d) 789, at 791---18

Kehrer *v.* Stewart, 197 U. S. 60---79
at 69---18
at 70 ---17, 26, 37

Laing *v.* Fox, (W. Va., 1934) 175 S. E. (Adv.) 354, 82
at 355---21

Leonard *v.* Vicksburg S. & P. R. Co., 198 U. S. 416, at 422---16

Leonhart *v.* Bd. of Education, (W. Va., 1933) 170 S. E. 418, at 419---19
at 420---52

Liggett *v.* Amos, 104 Fla. 609 (141 So. 153, 157) at 619---17

Liggett *v.* Baldridge, 278 U. S. 105---50

Liggett *v.* Lee, 288 U. S. 517---23, 25, 32, 33, 34
at 532 ---16, 17, 24, 27, 32
at 538-9---64

Louisville Gas Co. *v.* Coleman, 277 U. S. 32, at 39 48

Louisville & Nashville Railroad Co. *v.* Garrett, 231 U. S. 298, at 303---51
at 304---15, 22

PAGE

Louisiana Oil Corp. *v.* Rayner, 159 Miss. 783, (132 So. 739), at 793-4 ---- 68

McCray Refrigerator Co. *v.* United States, 195 U. S. 27 ---- 79
at 51, 61 ---- 17, 18, 26, 37

McGilvra *v.* Ross, 215 U. S. 70, at 80 ---- 16

Magnolia Petroleum Co. *v.* Johnson, 149 Ark. 553 (233 S. W. 680), at 556 ---- 68

Massachusetts State Grange *v.* Benton, 272 U. S. 525, at 529 ---- 15

Maryland Casualty Co. *v.* Kent, (Tex.) 271 S. W. 929, at 931 ---- 68

Mellitz *v.* Sunfield Co., 103 Conn. 177; 129 Atl. 228, at 231 ---- 20, 54, 61

Midwestern Petroleum Corporation *v.* Bd. of Tax Commissioners, (Ind., 1933) 187 N. E. 882 ---- 53, 62, 64
at 887 ---- 91
at 888 ---- 20, 59
at 889 ---- 68, 89, 90
Rehearing denied 191 N. E. (Adv.) 153 ---- 20

Mosher *v.* Phoenix, 287 U. S. 29, at 30 ---- 23

Nashville C. & St. L. Ry. Co. *v.* Wallace, 288 U. S. 249, at 268 ---- 50

Nichols *v.* Coolidge, 274 U. S. 531 ---- 50

Ohio Oil Co. *v.* Conway, 281 U. S. 146 ---- 48
at 159 ---- 47

Patton *v.* Brady, 184 U. S. 608, at 623 ---- 17, 18, 37

Pennsylvania Ry. Co. *v.* International Coal Company, 230 U. S. 198, at 199 ---- 66

PAGE

Poresky, Ex Parte, 290 U. S. 30 (See Ex Parte Poresky).

Postal Telegraph Co. *v.* Charleston, 153 U. S. 692, at 699-700 ..... 17, 18, 37, 79

Provo City *v.* Provo Meat & Packing Co., 49 Utah 528, (165 Pac. 477) ..... 87, 88

Quang Wing *v.* Kirkendall, 223 U. S. 59, at 63 ..... 91

Royster Guano Co. *v.* Virginia, 253 U. S. 412 ..... 48

Schlessinger *v.* Wisconsin, 270 U. S. 230 ..... 49

Shaffer *v.* Carter, 252 U. S. 37, at 58 ..... 86

Shelton *v.* Silverfield, 104 Tenn. 67 (56 S. W. 1023) 86

Siler *v.* Louisville & Nashville Railroad, 213 U. S. 175, at 192 ..... 15

Smith *v.* Illinois Bell Telephone Co., 282 U. S. 133 at 162 ..... 19, 45

Smyth *v.* Ames, 169 U. S. 466, at 518-9 ..... 22

Southern Grocery Stores *v.* South Carolina Tax Commission, 55 Fed. (2d) 931 ..... 26, 33, 34
at 933 ..... 17, 20, 64

Sperry & Hutchinson Co. *v.* Blue, 202 Fed. 82 ..... 76
at 85 ..... 76
at 88 ..... 78
at 89 ..... 19, 79

Sperry & Hutchinson Co. *v.* Melton, 69 W. Va. 124 (71 S. E. 19), ..... 70, 76, 78, 84
at 125-126 ..... 18, 71
at 127 ..... 21, 71, 80
at 128 ..... 71, 72

State Board of Tax Commissioners *v.* Jackson (See Board)

PAGE

State ex rel. Hallanan *v.* Thompson, 80 W. Va. 698 (93 S. E. 810), at 700 ---- 20

Stoffregen *v.* Moore, 271 Fed. 680, at 681 ---- 51

Stratton *v.* St. Louis & Southwestern Railroad, 282 U. S. 10, at 15 ---- 15, 22

Sugarman *v.* U. S., 249 U. S. 182, at 184 ---- 23

Swiss Oil Company *v.* Shanks, 273 U. S. 407 ---- 37

Treat *v.* White, 181 U. S. 264, at 269 ---- 17, 18

United States *v.* St. Paul M. & M. R. Co., 247 U. S. 310, at 318 ---- 66

United States *v.* United Shoe Machinery Co., 234 Fed. 127 ---- 47

United States *v.* United Shoe Manufacturing Co., 264 Fed. 138 (Appeal Dismissed, 254 U. S. 664) at 174 ---- 66

Veazie Bank *v.* Fenno, 8 Wall., 533, at 548 ---- 17, 18, 37

Viquesney *v.* Kansas City, 305 Mo. 488 (266 S. W. 700) ---- 88
at 498 ---- 20, 57

Wadhams Oil Co. *v.* State, 210 Wis. 448 (245 N. W. 646) (Rehearing 210 Wis. 457; 246 N. W. 687) ---- 53, 58

Western Distributing Co. *v.* Public Service Commission of Kansas, 285 U. S. 119, at 124 ---- 19, 45

Wilcox & Gibbs Sewing Machine Co. *v.* Ewing, 141 U. S. 627, at 636 ---- 68

Young, Ex Parte, 209 U. S. 123 (See Ex Parte Young)

Zucht *v.* King, 260 U. S. 174, at 176 ---- 16, 23

## CONSTITUTIONAL PROVISIONS

PAGE

Constitution of the United States:
Amendment V ---------- 37
Amendment XI ---------- 13, 15, 22
Amendment XIV -- 13, 23, 26, 35, 37, 72, 73, 83, 92

Constitution of West Virginia:
Art. III, Sec. 10 ---------- 4, 14, 69
Art. VI, Sec. 30 ---------- 13, 52, 53
Art. VIII, Sec. 5 ---------- 60
Art. X, Sec. 1 ---------- 4, 14, 69, 70, 82, 84

---

## STATUTES

Judicial Code:
Sec. 266, Amended by Sec. 380, (28 U. S. C. A., Secs. 266 and 380) ---------- 22

West Virginia Code, (1931):
Ch. 11, Art. 14 ---------- 9
Ch. 11, Art. 14, Sec. 2 ---------- 89

Acts of the Legislature of West Virginia, 1933 Regular Session:
Ch. 36 ---------- 13, 14
Ch. 36, Sec. 8 ---------- 2, 12, 59, 62, 92

Indiana Statutes (Burns Annotated):
Watson's Revision, Vol. 4, Supp. 1929, Sec. 10187.1, p. 684, Acts 1929, p. 68 ---------- 89

**TEXTS**

PAGE

Cooley on Taxation:
(4th Ed.) Vol. 1, Sec. 233, p. 495 ---------- 85

Corpus Juris:
Vol. 14, Sec. 26, p. 62, subject, "Corporations" ---------- 47
Vol. 21, page 904, subject, "Mercantile Establishment" ---------- 21
Vol. 59, Sec. 605, p. 1019, subject, "Statutes" 66

Fletcher, Cyc. of Corporations:
Vol. 1, Sec. 26, p. 63---------- 47

Lewis' Sutherland Statutory Construction, (2d Ed.) Sec. 390---------- 58

Thompson on Corporations, (3d Ed.) Vol. 1, Sec. 10, pp. 16-18---------- 47

# Supreme Court of the United States

OCTOBER TERM, 1934.

## No. 69

---

FRED L. FOX, IN HIS INDIVIDUAL RIGHT AND IN HIS OFFICIAL CAPACITY AS TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA, *Appellant*,

v.

STANDARD OIL COMPANY OF NEW JERSEY, *Appellee*.

---

## BRIEF OF APPELLANT

---

### OPINIONS BELOW

The opinions of the court below are reported in 6 Fed. Supp. (Adv.), page 494.

### JURISDICTION

A statement as to jurisdiction has been filed and separately printed, pursuant to Rule 12, Paragraph 1 of this Court. It is not controverted that Section 238,

as amended, of the Judicial Code confers jurisdiction upon this Court. Probable jurisdiction was noted on June 4, 1934.

## STATEMENT OF THE CASE

This is an appeal from the judgment of the United States District Court for the Southern District of West Virginia rendered by a three-judge court convened under the provisions of Section 266, amended, of the Judicial Code (R. 73). The suit involves the constitutionality of the West Virginia chain store tax act as applied to so-called "gasoline filling stations" and bulk plants. The act is referred to as H. B. 112, or Chapter 36, Acts of the Legislature of West Virginia, Regular Session, 1933 (R. 38). The term "store" is defined by Section 8 of said act:

> "The term 'store' as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained and/or controlled by the same person, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale." (R. 40).

The act imposes a license fee for the operation of each store, graduated according to the number of stores operated within the state under the same management, supervision or ownership (R. 39), resulting in the following rates:

| | |
|---|---|
| First store | $ 2.00 |
| Second to fifth, inclusive | 5.00 each |
| Sixth to tenth, inclusive | 10.00 each |

| | |
|---|---|
| Eleventh to fifteenth, inclusive | 20.00 each |
| Sixteenth to twentieth, inclusive | 30.00 each |
| Twenty-first to thirtieth, inclusive | 35.00 each |
| Thirty-first to fiftieth, inclusive | 100.00 each |
| Fifty-first to seventy-fifth, inclusive | 200.00 each |
| Seventy-sixth and all additional | 250.00 each |

(R. 39-40).

For each store a filing fee of fifty cents, in addition to the graduated license fee, is required (R. 38).

The appellee, Standard Oil Company of New Jersey, a Delaware corporation, is engaged in the refining and distribution of petroleum products as distinguished from the production and transportation of crude petroleum (R. 175), and operates principally in seven states, including West Virginia, and in the District of Columbia (R. 6). Appellee is a subsidiary of Standard Oil Company, a New Jersey corporation, which owns all of the capital stock of appellee Delaware corporation. The New Jersey corporation is a holding corporation, owning all of the stock or an interest in a large number of producing, manufacturing, transporting and marketing companies practically throughout the world (R. 146, 212).

On the effective date of the act appellee operated in West Virginia 101 filling stations (R. 49, 150) and 54 bulk plants (R. 49) owned by it, and 848 exclusive contract outlets (R. 49) on which appellee had leases and vending privilege leases [Exhibit "E" (R. 49) and Exhibit "G" (R. 58)], the rental of which was measured by the quantities of petroleum products sold, and operated by agents of appellee paid by commission [Exhibit "F" (R. 53) and Exhibit "H" (R. 62)], with respect to which it is stipulated that for the sale of petroleum products, which remained the property of appellee (R.

168), the operators were agents of appellee (R. 148, 164); in all 1003 stores upon which, under protest (R. 47), appellee paid $240,173.50 taxes and filing fees (R. 49).

Before the time appellant was required to pay said money into the state treasury (R. 36-72) appellee brought this suit in equity to enjoin the payment of the money into the state treasury (R. 37) claiming federal jurisdiction because the act was violative of the Fourteenth Amendment to the Constitution of the United States in denying the appellee the equal protection of the laws and depriving it of property without due process of law (R. 27), claiming jurisdiction in equity because of absence of adequate remedy at law (R. 35-36), and further presenting non-federal questions that filling stations were not stores within the meaning of the act (R. 20), and that, if construed to be applicable to appellee, the act violated the provisions of Section 10, Article III and Section 1, Article X of the Constitution of West Virginia (R. 32). The appellee applied for and insisted upon an interlocutory injunction (R. 71).

Appellant moved to dismiss the bill on the ground that the alleged federal questions were frivolous and insubstantial for the reason that the bill presented only alleged federal questions which had previously been decided by the Supreme Court of the United States contrary to the contentions of appellee (R. 75, 93) and because of the existence of an adequate remedy at law (R. 75). Appellant filed answer denying all allegations of unconstitutionality, state or federal, asserting that appellee's bulk plants and filling stations were stores within the meaning of the act (R. 89, 97, 102) and denying that appellee's business did not enjoy the so-called benefits of chain store operations considered in previous decisions (R. 94-97). An extended stipulation of evidence was filed.

### Disposition of Case by Trial Court

The court below determined that the equal protection of the laws guaranteed by the Fourteenth Amendment was denied appellee by the statute (R. 264) and that filling stations were not stores within the meaning of the statute (R. 263-276). No conclusions of law separate from the opinions of the court were made (R. 287).

### Findings of Fact

In view of the stipulation the court found it unnecessary to repeat the entire stipulation as findings of fact, but summarized certain facts appearing from the stipulation considered to have special importance in relation to the discussion in the opinions of the court (R. 276-287).

### Final Judgment

The court overruled the motion to dismiss, and awarded a permanent injunction against the enforcement of the statute against the appellee and required appellant to account to appellee for the money paid (R. 288).

### The Stipulation of Evidence

The stipulation of evidence on behalf of appellee shows that by reason of the large number of units operated by gasoline companies, of the total store tax of $569,-693.00 gasoline stations pay $486,168.00, or 85.3%; that of gross sales, other businesses made 93.8% of the sales and gasoline stations, 6.2% (R. 145), from which it may be computed that appellee pays 42% of the entire store tax; that the gross sales per unit for gasoline stations are much less than the gross sales per unit for other lines of merchandise (R. 196, 171, 148); the average net earn-

ings of company-owned stations, as shown by books of appellee, for 1930, 1931, 1932, and eight months of 1933, are, respectively, $3,000.98, $3,641.25, $1,782.78, profit, and $8.73, loss (R. 151); individual records of business of the agency stations are not kept (R. 169) but from the books of appellee computations were made showing (R. 170): the average profit for agency outlets for 1932, $89.75; the average loss for the first six months of 1933, $62.97 (R. 171). Such computation by classes of outlets for 1931 is shown by "Table No. 5" (R. 302A), and the loss for the first six months of 1933 is shown by "Table No. 7" (R. 302B), and the average profits for 1932 are shown by "Table No. 6" (R. 280A).

The computation of profit or loss is from the marketing operations in the State of West Virginia. Two factors are determinative: first, the gross operating revenues from the sale of products within the State, and, second, the expenses of operation. The expenses include the refinery billing costs of products delivered to the marketing departments in the State. Such costs are not the actual production, transportation and refining costs (R. 214). The company's books show refinery losses, including loss at the Parkersburg refinery, based on prices at which petroleum is billed the refinery (R. 176-7); such prices do not purport to be the actual cost of the production of such petroleum by plaintiff's affiliates, and no showing of such actual cost to any affiliate of the plaintiff of the production and transportation of petroleum delivered to the plaintiff is made in the stipulation. The refinery prices are fixed from time to time by the New York office of appellee and approximate those commonly reported as open market prices (R. 207-8). The refinery billing prices of the company have not been based upon the costs of production in the company's refineries (R. 177).

Posted retail prices of petroleum products of appellee are fixed from the New York office of appellee. Posted prices of motor fuel change from time to time during the year. There were eight changes during 1932 and five changes in 1933 to the date of stipulation, including an increase of 1½¢ per gallon during the month of May, 1933 (R. 208). Such prices posted by the principal dealers in West Virginia in general are uniform (R. 77-78, 183-184). These prices are posted by the distributors of gasoline singly or with other distributors (R. 295-6).

Appellant, being advised that appellee was a mere subsidiary of Standard Oil Company, a New Jersey corporation which owned all of the capital stock of appellee, and that appellee was not engaged in the business of producing and transporting crude petroleum but only in refining and distributing petroleum products, for the purpose of preparing stipulation, called on appellee for information concerning activities of Standard Oil Company in all branches from the taking of leases, drilling for petroleum, on through the refining (R. 211-212). Appellee declined to furnish the requested information, stating that Standard Oil Company, the New Jersey corporation, owned all of the stock or an interest in many companies throughout the world, and that, "The profit or losses sustained by many of these companies, in our opinion, will add nothing of value to the study being made of our business in West Virginia." Information was given of computed loss of Carter Oil Company, a subsidiary of Standard Oil Company of New Jersey, the Delaware corporation, on petroleum furnished appellee at Parkersburg, ascertained by determining the company's (Carter's) loss per barrel of all oil handled by it and applying the same to the gallonage so sold and delivered (R. 209). Information was also given of profit accruing to appellee or its affiliates through stock owner-

ship in Oklahoma Pipeline Company and Ajax Pipeline Company on oil transported to Parkersburg, likewise computed on all business of said pipeline companies (R. 209); information was given that a subsidiary of Standard Oil Company, the New Jersey corporation, owned approximately 20% of the stock of Atlas Supply Company, that the gross revenue of appellee from sales of tires and tubes sold by Atlas Supply Company to plaintiff during the year 1932 as $299,084.85 and stated that the subsidiary received dividends from stock holdings in Atlas Supply Company from West Virginia sales of approximately $11,323.71.

It was stipulated that if witnesses competent to testify concerning the financial affairs of plaintiff and its affiliates were examined with respect to such desired information, they would refuse to give such information and assign as reasons therefor that "such information is immaterial to the matters involved in this cause," and that the position of appellee was that "any information concerning matters outside of the marketing transactions of the plaintiff are therefore immaterial to the issues raised herein" (R. 210).

The above stipulation resulted from the charge of the appellant (R. 217-218) in the amended answer that the principal purpose of the operation of the many companies of the Standard Oil group is the substantial control of the production and marketing of petroleum and natural gas, and that the refining and wholesale and retail distribution is but an incident in the production and transportation of crude petroleum and natural gas, and that the inter-relations of the various companies are such as to permit the crediting or charging of such companies with profits or losses among the various companies, practically at will (R. 127-128). Appellant called

upon appellee for strict proof of the business relations between appellee, Standard Oil Company of New Jersey, a Delaware corporation, and Standard Oil Company, a New Jersey Corporation, and all other parent, affiliate or subsidiary companies in support of any allegations of confiscation (R. 128).

Affiliates of appellee produce in West Virginia annually, largely within one hundred miles of the Parkersburg refinery, crude oil sufficient to make 6,100,000 gallons of commercial motor fuel, none of which crude oil is utilized at the Parkersburg refinery. Affiliates produce in West Virginia 18,000,000 gallons of absorption gasoline suitable for blending and making motor fuel. The Parkersburg refinery uses none of this absorption gasoline. It is sold by said affiliates in large measure to other affiliates, and through brokers to other companies and not used for the West Virginia business (R. 207).

On charging a burden of taxation in West Virginia, appellee claims to have paid, in 1932, $1,963,262.57 taxes, amounting to 19.2% of its gross revenues from its West Virginia marketing business (R. 17). Of this amount approximately $1,818,476.84 (less $5.00 for each bulk plant and $1.00 for each station) is gasoline gallonage tax collected under Article 14, Chapter 11, Code of West Virginia (R. 105-118) which appellant contends is a consumers' tax and not a tax upon appellee (R. 83). Other taxes paid the State of West Virginia by appellee for the year 1932 were $81,066.58 (R. 203).

Appellee denies that the chain filling stations enjoy the recognized advantages which ordinarily characterize other chain store operations (R. 22-26). The record shows that substantially all of the petroleum products marketed in West Virginia by appellee come from

appellee's own refineries (R. 147); distribution by appellee in its marketing operations from single warehouses to numerous stores (R. 152); appellee has available abundant capital (R. 24); company and agency stations have a greater turnover of business than individual stations (R. 167); appellee's marketing business has a simplified and consolidated administrative and bookkeeping system (R. 162, 181-2); specially trained personnel (R. 183); distinctive trade names for products (R. 187); unified advertising (R. 185), such advertising extending from Maine to Louisiana (R. 300). The entire record shows specialization in its marketing by appellee, and standardization (R. 212). Appellee's and affiliates' business is highly integrated, comprising participation in the petroleum industry from production of the crude to retail distribution of refined products (R. 212).

Appellee sells gasoline to independent dealers at three cents per gallon below posted prices (R. 173). The deliveries to agency stations are made at two and one-half cents below posted prices with a further one cent deduction for lease rental, making in all three and one-half cents below posted prices (R. 168). The man-hour sales at company-owned stations were $2.66, at agency stations $2.64, and at individually-owned stations $2.44 for the year 1932 (R. 184). The percentage of utility charges to gross sales were: company-owned stations 1.88, agency stations 1.42 and individually-owned stations 2.20 (R. 184-185). For the year 1932 the gross sales of approximately 2,000 non-chain gasoline stations amounted to $5,158,000.00, while gross sales of 2,453 chain gasoline stations (two or more) amounted to $15,198,638.94 (R. 145).

It appears that Sinclair Refining Company, Ashland Refining Company, Pure Oil Company, Gulf Refining

Company, Standard Oil Company, The Great A. & P. Tea Company, and the Kroger Grocery & Baking Company are all of the companies in West Virginia which operate as many as seventy-five units (R. 142-3-4). Showings of operating losses of Sinclair Refining Company, Pure Oil Company and Gulf Refining Company computed from book prices, no actual cost shown, and losses of Ashland Refining Company are stipulated (R. 214-224).

Certain competitive situations showing the experience of other companies operating less units and paying less tax per unit than appellee are shown (R. 190-195). Statements concerning revenues and chain store taxes on certain of appellee's stations and other stations in the same localities are likewise shown (R. 234-37).

In the Senate of the Legislature of West Virginia during the enactment of the act, an amendment was proposed: "that the term 'store' shall not include filling stations engaged exclusively in the sale of gasoline and other petroleum products" (R. 119). The proposed amendment did not carry (R. 122).

## SPECIFICATION OF ERRORS RELIED UPON

Appellant will rely upon the assignment of errors filed with the petition for appeal (R. 291, 292) and upon the points stated to be relied upon set forth in the statement filed under Rule 13, Paragraph 9 (R. 298, 299), which are as follows:

### Assignment of Errors

(1) The court erred in overruling defendant's motion to dismiss plaintiff's bill of complaint for want of jurisdiction.

(2) The court erred in holding, as a conclusion of law, that the several filling or service stations owned and/or operated by plaintiff, are not stores, within the meaning of the term "store" as defined in the "Chain Store Act" House Bill No. 112 (Chapter 36, Acts of the West Virginia Legislature, 1933, Regular Session).

(3) The court erred in holding as a conclusion of law that the enforcement of said House Bill No. 112 (Chapter 36, Acts of the Legislature of West Virginia, 1933, Regular Session), against the plaintiff denies the plaintiff the equal protection of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

(4) The court erred in awarding the permanent injunction prayed for in said bill of complaint.

### Statement of Points to Be Relied Upon

#### Point I.

The alleged questions of constitutionality under the Constitution of the United States have been

decided adversely to the contentions of the appellee so consistently that such questions are now insubstantial and frivolous, and the suit is one against the State of West Virginia for the maintenance of which, by reason of the Eleventh Amendment to the Constitution of the United States, there is no Federal jurisdiction.

## Point II.

The classification of the subject matters of taxation of House Bill No. 112 (Chapter 36), Acts of the Legislature of West Virginia, Regular Session, 1933, is reasonable and well founded in fact and law, and the imposition of the taxes thereof upon the appellee does not deprive the appellee of property without due process of law or deny the appellee the equal protection of the laws in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

## Point III.

The title of said House Bill No. 112 (Chapter 36), Acts of the Legislature of West Virginia, Regular Session, 1933, gives a fair and reasonable index to all of the purposes of the act and complies with the requirements of Section 30, Article VI of the Constitution of West Virginia.

## Point IV.

The filling stations and bulk plants for the operation of which the appellee was required to pay the taxes provided by said House Bill No. 112 (Chapter 36), Acts of the Legislature of West Virginia, Regular Session, 1933, are stores or mercantile establishments owned, operated, maintained and/or controlled by the appellee within the meaning of said act.

## Point V.

The Constitution of West Virginia does not prevent the reasonable classification of the subject matters of taxation and the imposition of the taxes provided by House Bill No. 112 (Chapter 36), Acts of the Legislature of West Virginia, Regular Session, 1933, does not deprive the appellee of property without due process of law in violation of the provisions of Section 10 of Article III of the Constitution of West Virginia.

## Point VI.

The imposition of the taxes provided by House Bill No. 112 (Chapter 36), Acts of the Legislature of West Virginia, Regular Session, 1933, upon the appellee is not violative of the "equal and uniform" provision of the Constitution of West Virginia, Section 1, Article X as amended in 1932, and no part of said section of the Constitution of West Virginia inhibits the imposition of graduated taxes upon classified subject matters of taxation.

## SUMMARY OF ARGUMENT

### I.

Appellant's motion to dismiss the bill of complaint should have been sustained.

(a) If the act complained of (H. B. 112) be unconstitutional, the suit against appellant, a state officer, is a suit against the State of West Virginia, and, because of the Eleventh Amendment to the Constitution of the United States, may not be maintained.

*Ex parte Young,* 209 U. S. 123, 149 *et seq.*
*Ex parte Ayres,* 123 U. S. 443, 487.
*Fitts* v. *McGhee,* 172 U. S. 516, 525.
*Massachusetts State Grange* v. *Benton,* 272 U. S. 525, 529.
*De Pauw University* v. *Brunk,* 53 Fed. (2d) 647, 652, affirmed 285 U. S. 527.
*Herkness* v. *Irion,* 11 Fed. (2d) 386, 389.

(b) In order that federal jurisdiction may be sustained in an action against a state officer because of unconstitutionality of statute under which officer acts such unconstitutionality must be predicated upon the Federal Constitution.

*Stratton* v. *St. Louis & Southwestern Railroad,* 282 U. S. 10, 15.
*Louisville & Nashville Railroad Company* v. *Garrett,* 231 U. S. 298, 304.
*Siler* v. *Louisville & Nashville Railroad,* 213 U. S. 175, 192.

(c) The question of unconstitutionality under the Federal Constitution must be substantial. A federal question may be plainly unsubstantial either because it

is obviously without merit or because its unsoundness so clearly results from previous decisions of the court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.

*Ex parte Poresky,* 290 U. S. 30, 31.
*McGilvra* v. *Ross,* 215 U. S. 70, 80.
*Leonard* v. *Vicksburg S. & P. R. Co.,* 198 U. S. 416, 422.
*Zucht* v. *King,* 260 U. S. 174, 176.

(d) The federal questions alleged are:

(1) Arbitrary and unreasonable classification (chain store taxation), and

(2) Confiscatory rates of taxation.

The contention that chain store taxation is arbitrary, unreasonable and discriminatory has been uniformly resolved by the Supreme Court of the United States adversely to the contention of appellee.

*Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527, 537.
*Liggett* v. *Lee,* 288 U. S. 517, 532.
*Great A. & P. Tea Company* v. *Morrissett,* 284 U. S. 584.
*Great A. & P. Tea Company* v. *Maxwell,* 284 U. S. 575.

Even though the taxation may appear oppressive, the Supreme Court of the United States has uniformly held that the responsibility of the legislature therefor is to the people and not to the courts.

*A. Magnano Company* v. *Hamilton, Attorney General,* 291 U. S. ___; 78 L. Ed. (Adv.) 712, 715.
*Veazie Bank* v. *Fenno,* 8 Wall., 533, 548.
*McCray Refrigerator Company* v. *United States,* 195 U. S. 27, 51, 61.
*Patton* v. *Brady,* 184 U. S. 608, 623.
*Treat* v. *White,* 181 U. S. 264, 269.
*Kehrer* v. *Stewart,* 197 U. S. 60, 70.
*Alaska Fish Company* v. *Smith,* 255 U. S. 44, 48.
*Postal Telegraph Co.* v. *Charleston,* 153 U. S. 692, 699-700.
*Austin* v. *Board of Aldermen,* 7 Wall., 694, 698.
*Green* v. *Frazier,* 253 U. S. 233, 239.

II.

(a) The bulk plants and filling stations of appellee are operated as an integrated chain with all of the so-called benefits characterizing chain store operations considered in previous chain store cases, and the basis of classification of the act in question is reasonable and proper.

*Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527, 537, 541.
*Louis K. Liggett Company* v. *Lee,* 288 U. S. 517, 532.
*Liggett* v. *Amos,* 104 Fla. 609, 619; 141 So. 153, 157.
*Southern Grocery Stores* v. *South Carolina Commission,* 55 Fed. (2d) 931, 933.
*Great Atlantic & Pacific Tea Company* v. *Morrissett,* 58 Fed. (2d) 991, 993.
*Great A. & P. Tea Company* v. *Morrissett,* 284 U. S. 584.

*J. C. Penny Stores* v. *Mitchell,* 59 Fed. (2d) 789, 791.

*Great A. & P. Tea Co.* v. *Maxwell,* 199 N. Car. 433, 440; 154 S. E. 838, 842.

*Great A. & P. Tea Co.* v. *Maxwell,* 284 U. S. 575.

*F. W. Woolworth Co.* v. *Harrison,* 172 Ga. 179; 156 S. E. 904, 905.

*Commonwealth* v. *Bibee Grocery Co.,* 153 Va. 935, 939; 151 S. E. 293, 294.

(b) The basis of classification of the act being valid, the determination of the rate of taxation is for the legislature and not the courts.

*A. Magnano Co.* v. *Hamilton, Attorney General,* 291 U. S. ---; 78 L. Ed. (Adv.) 712, 715.

*Veazie Bank* v. *Fenno,* 8 Wall., 533, 548.

*McCray Refrigerator Co.* v. *United States,* 195 U. S. 27, 51, 61.

*Patton* v. *Brady,* 184 U. S. 608, 623.

*Treat* v. *White,* 181 U. S. 264, 269.

*Kehrer* v. *Stewart,* 197 U. S. 60, 69.

*Alaska Fish Company* v. *Smith,* 255 U. S. 44, 49.

*Postal Telegraph Company* v. *Charleston,* 153 U. S. 692, 699.

*Austin* v. *Board of Aldermen,* 7 Wall., 694, 699.

*Green* v. *Frazier,* 253 U. S. 233, 240.

*Best Foods, Inc.* v. *Welch,* 34 Fed. (2d) 682, 686.

*A. Magnano Company* v. *Dunbar,* 2 Fed. Supp. 417, 419.

*Clay Products Company* v. *U. S.,* 52 Fed. (2d) 1033, 1034.

*Sperry & Hutchinson Co.* v. *Melton,* 69 W. Va. 124, 125-126; 71 S. E. 19, 20.

*Sperry & Hutchinson Co.* v. *Blue,* 202 Fed. 82, 89.

*Interstate Company* v. *Richardson,* 177 Ga. 9, 15; 169 S. E. 373, 376.

*Erwin* v. *City of Omaha,* 118 Neb. 331, 336; 224 N. W. 692, 694.

*Fleischmann Co.* v. *Conway,* 168 La. 547, 551; 122 So. 845, 847.

(c) Even if the rates of taxation involved were for judicial determination, which they were not, the appellee by refusing upon demand to make a full showing of the profits or losses of its business and the business of all affiliated companies as related to the West Virginia business of appellee has failed to make out a case of confiscation.

*Dayton Power & Light Company* v. *Public Utilities Commission,* 291 U. S. ---; 78 L. Ed. (Adv.) 832, 843.

*Columbia Gas & Fuel Company* v. *Public Utilities Commission of Ohio,* 291 U. S. ---; 78 L. Ed. (Adv.) 885, 891.

*Western Distributing Company* v. *Public Service Commission of Kansas,* 285 U. S. 119, 124.

*Smith* v. *Illinois Bell Telephone Company,* 282 U. S. 133, 162.

## III.

Under the West Virginia decisions the title of the act relating to stores is sufficient to sustain the entire enactment applying to stores and mercantile establishments.

*Leonhart* v. *Board of Education,* (W. Va., 1933) 114 W. Va. ---; 170 S. E. 418, 419.

*State ex rel. Hallanan* v. *Thompson,* 80 W. Va. 698, 700; 93 S. E. 810, 811.

*Brozka* v. *County Court,* 111 W. Va. 191, 192; 160 S. E. 914, 915.

*Bent* v. *Weaver,* 108 W. Va. 299, 301; 150 S. E. 738, 739.

IV.

Gasoline and motor oil are merchandise and the bulk plants and filling stations for which appellee paid the taxes involved in this action are stores or mercantile establishments owned, operated, maintained and/or controlled by appellee.

*Midwestern Petroleum Corporation* v. *Board of Tax Commissioners,* (Ind., 1933) 187 N. E. 882, 888. Rehearing denied, 191 N. E. (Adv.) 153.

*Gunther* v. *Atlantic Refining Company,* 277 Pa. 289, 293; 121 Atl. 53, 54.

*Mellitz* v. *Sunfield Company,* 103 Conn. 177; 129 Atl. 228, 231.

*Charleston Oil Company* v. *Poulnot,* 143 S. C. 283, 291; 141 S. E. 454, 457.

*Abbott* v. *Steigman,* 263 Mass. 585, 588; 161 N. E. 596, 597.

*Viquesney* v. *Kansas City,* 305 Mo. 488, 498; 266 S. W. 700, 703.

*City of Troy* v. *Harris,* 102 Mo. App. 51, 59; 76 S. W. 662, 665.

*Gasoline Company* v. *St. Louis,* 326 Mo. 435, 445; 32 S. W. (2d) 281, 284.

*Southern Grocery Stores* v. *South Carolina Commission,* 55 Fed. (2d) 931, 933.

*Craig* v. *Pattison,* 74 Miss. 881, 884; 21 So. 756, 757.

21 Corpus Juris, Subject, "Mercantile Establishment," page 904.

V. AND VI.

Neither the due process clause (Section 10, Article III) nor the equal and uniform clause (Section 1, Article X) of the Constitution of West Virginia requires abstract equality or uniformity in taxation, but the subject matter of taxation may be classified and the act here involved violates neither of said provisions of the State Constitution.

*Eureka Pipe Line Company* v. *Hallanan,* 87 W. Va. 396, 411; 105 S. E. 506, 513.

*Hope Natural Gas Company* v. *Hall,* 102 W. Va. 272, 277, 279; 135 S. E. 582, 583.

*Hope Natural Gas Company* v. *Hall,* 274 U. S. 284, 289.

*Sperry & Hutchinson* v. *Melton,* 69 W. Va. 124, 127; 71 S. E. 19, 21.

*Laing* v. *Fox,* (W. Va., 1934) 175 S. E. (Adv.) 354, 355.

## ARGUMENT

### I.

### The Motion to Dismiss Because of Want of Federal Jurisdiction Should Have Been Sustained.

The bill alleges diversity of citizenship (R. 3), but from a reading of the bill it is clear that no acts of the appellant apart from his duties under the act in question are alleged. If the act be constitutional, then appellant's acts are official acts and the suit is one against the State of West Virginia, which, because of the Eleventh Amendment to the Constitution of the United States, may not be maintained. *(Herkness* v. *Irion,* 11 Fed. (2d) 386, 389; *Ex parte Young,* 209 U. S. 123, 149 *et seq.).*

The principle that if the act be unconstitutional no one then acts for the state in purporting to enforce such act, and the suit becomes one against the individual and not against the state, is recognized. *(Smyth* v. *Ames,* 169 U. S. 466, 518-9.) This but emphasizes that diversity of citizenship is not the basis of the alleged federal jurisdiction, but that the jurisdiction purported to be averred is that of Section 266, as amended, of the Judicial Code, grounded in the alleged unconstitutionality of a state law under which a state officer acts.

The alleged unconstitutionality which will sustain the federal jurisdiction must be unconstitutionality under the federal constitution. *(Stratton* v. *St. Louis & Southwestern Railroad Co.,* 282 U. S. 10, 15.)

The federal question must be a substantial one, otherwise the jurisdiction fails. *(Louisville & Nashville Railroad Company* v. *Garrett,* 231 U. S. 298, 304.)

It is recognized that jurisdiction is determined from the allegations of the bill and not by the final disposition of the case, and may exist if the question presented be substantial, even though the final decision be adverse to the contentions of the proponent thereof. (*Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499, 508; *Mosher* v. *Phoenix*, 287 U. S. 29, 30.) That does not mean, however, that a question which will sustain jurisdiction is presented merely because the bill contains empty averments that such constitutional questions are presented. (Compare *Sugarman* v. *U. S.*, 249 U. S. 182, 184.)

A reading of the bill shows that so far as federal questions are concerned, appellee purports to present only two: (1) denial of equal protection of laws in the chain store classification as applied to appellee's business, and (2) the deprivation of appellee of property without due process of law because of the alleged high rate of taxation, contrary in each instance to the provisions of the Fourteenth Amendment.

A substantial question of equal protection of the laws was presented in the case of *Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527, and, because of the difference of rates based upon county lines, in *Liggett* v. *Lee*, 288 U. S. 517, (substantially the same questions not having previously been presented to the Court) but when a question has been foreclosed by prior decisions of the Court, the question may no longer be substantial. (*Ex parte Poresky*, 290 U. S. 30, 31; *Zucht* v. *King*, 260 U. S. 174, 176.)

True, appellee alleges that neither of these cases involved filling stations and makes the empty averment that chain filling stations and bulk plants do not enjoy the so-called advantages of chain stores considered in the

previous cases. Yet, from the facts stated in attempting to deny such advantages, the actual presence of the so-called advantages appears from the face of the bill. For instance, centralized management (R. 6-7), quantity buying or the equivalent thereof, and mass process of distribution, state-wide market (R. 23); producing and distributing its own products, equivalent to buying for cash at discount (R. 7, 23-24); abundant supply of capital (R. 24-25); trained personnel (R. 19); distribution from single warehouse to numerous stores (R. 8, 24); unified national advertising (R. 26); specialization of merchandise (R. 26); standardization in operations (R. 12, 26). A consideration of the entire bill shows a business more extended, more highly specialized and more integrated perhaps, than those shown by the bills in the previous chain store cases.

From a reading of the bill it would seem that appellee's efforts to show that its methods of doing business are no different from those of other single units are summarized by the observation made in the opinion in the case of *Liggett* v. *Lee*, 288 U. S. 517, 532, wherein, in commenting upon similar arguments presented in that case and referring to the case of *State Tax Commissioners* v. *Jackson*, 283 U. S. 527, it was said:

> "This is but a reiteration of the contention made and overruled in *State Board of Tax Comrs.* v. *Jackson*, 283 U. S. 527. It was there held that whatever may be said of individual similarities and differences between chain store operation and the conduct of a single shop or a department store, the former employ distinguishable methods of conducting business, and the legislature may make the difference in method and character of the business the basis of classification for taxation. In their bill the complainants aver that the fact

situation in Florida at the date of suit differed materially from that set forth in the *Jackson* case. Each of the features of chain store operation enumerated in this court's opinion is singled out, and as respects each the averment is that as to some chain store operators, or some operators of individual stores, the present case differs from the *Jackson* case.

"In their endeavor thus to distinguish the earlier case, the appellants stress mere details, but ignore the underlying reason for sustaining the classification there attacked. The decision in the *Jackson* case was based not upon any single feature of chain store management, but upon the ultimate fact of common knowledge, illustrated and emphasized by the evidence, that the conduct of a chain of stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually operated small store or department store; and that the difference between an integrated and a voluntary chain is fundamental."

And, at page 533:

"As we have held, gradation of the tax according to the number of units operated cannot be said to be so unreasonable as to transcend the constitutional powers of the legislature. The addition of a store to an existing chain is a privilege, and an increase of the tax on all the stores for the privilege of expanding the chain cannot be condemned as arbitrary; * * *."

The decisions of this Court in the cases of *Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527; *Liggett* v. *Lee*, 288 U. S. 517; *Great A. & P. Tea Company* v.

*Morrissett,* 284 U. S. 584; *Great A. & P. Tea Company* v. *Maxwell,* 284 U. S. 575; and the decisions of the Federal Courts of the Fourth Circuit, in which is the State of West Virginia, in cases of *Great A. & P. Tea Company* v. *Morrissett,* 58 Fed. (2d) 991, and *Southern Grocery Stores* v. *South Carolina Commission,* 55 Fed. (2d) 931, foreclose the question of the propriety of classifying multiple ownership as distinguished from individual ownership for purposes of taxation in favor of the validity of such classification and the gradation of taxes.

If there be no question of the propriety of classification, the alleged question of judicial review of legislative determination of rates of taxation, the legality of which can not be questioned otherwise, is likewise foreclosed. The bill particularly alleges that the act is a tax measure (R. 27). The due-process-of-law clause of the Fourteenth Amendment is not a limitation upon the taxing power, as such, of the legislatures of the states. It is a limitation only when the conclusion is compelled that the act does not involve the exercise of the taxing power, but constitutes the direct exercise of a different and forbidden power, and is a mere disguise for the exercise of another power which does not exist. *(A. Magnano Company* v. *Hamilton,* 291 U. S. ---, 78 L. Ed. (Adv.) 712, 715.)

The tax may not be judicially stricken down simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses. *(A. Magnano Company* v. *Hamilton,* 291 U. S. ---, 78 L. Ed. (Adv.) 712, 715; *Alaska Fish Company* v. *Smith,* 255 U. S. 44, 48; *McCray Refrigerator Company* v. *United States,* 195 U. S. 27, 52-61; *Kehrer* v. *Stewart,* 197 U. S. 60, 70.)

The allegations of the bill are that appellee's filling station business will be burdened and appellee will be required to cancel a part or all of its outlet contracts. The bill does not allege that any power other than the taxing power is exercised in the act, or that the taxing power is used as a disguise for the exercise of some prohibited power, but merely alleges that the tax is burdensome and oppressive (R. 28).

It is believed that the questions of classification, of the gradation of rates thereunder and of the amount of the rates of taxation have been so foreclosed by previous decisions of this Court as to cause such alleged questions now to be so frivolous and unsubstantial as not to sustain the federal jurisdiction alleged.

## II.

**The Bulk Plants and Filling Stations of Appellee Are Operated as an Integrated Chain with All of the So-called Advantages Characterizing Chain Store Operations Considered in Previous Chain Store Cases, and the Basis of Classification Is Reasonable and Proper.**

It can not be doubted that appellee's filling stations and bulk plants are operated as a chain. Any attempt at denial but accentuates the inescapable fact. And that such methods of merchandising constitute a form and method of merchandising apart from the practices of individually operated units becomes a matter of common knowledge, not requiring proof but judicially recognized. In the case of *Liggett* v. *Lee,* 288 U. S. 517, 532, the Court, commenting upon the earlier case of *Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527, said:

> "This is but a reiteration of the contention made made and overruled in *State Board of Tax Comrs.*

v. *Jackson*, 283 U. S. 527. It was there held that whatever may be said of individual similarities and differences between chain store operation and the conduct of a single shop or a department store, the former employ distinguishable methods of conducting business, and the legislature may make the difference in method and character of the business the basis of classification for taxation. In their bill the complainants aver that the fact situation in Florida at the date of suit differed materially from that set forth in the *Jackson* case. Each of the features of chain store operation enumerated in this court's opinion is singled out, and as respects each the averment is that as to some chain store operators, or some operators of individual stores, the present case differs from the *Jackson* case.

"In their endeavor thus to distinguish the earlier case, the appellants stress mere details, but ignore the underlying reason for sustaining the classification there attacked. The decision in the *Jackson* case was based not upon any single feature of chain store management, but upon the ultimate fact of common knowledge, illustrated and emphasized by the evidence, that the conduct of a chain of stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually operated small store or department store; and that the difference between an integrated and a voluntary chain is fundamental. While incidents of the operation of the one may be quite similar to those found in the other, there is a clear distinction between one owner operating many stores and many owners each operating his own store with a greater or less measure of co-operation voluntarily undertaken. The legislature may make the distinction the occasion of classification

for purposes of taxation. Neither similarity of opportunities and advantages in some aspects, nor the fact that the one kind of store competes with the other, is enough to condemn the discrimination in the taxes imposed. It is needless to repeat what was said in the *Jackson* case to the effect that the difference between the subjects taxed need not be great, and that if any reasonable distinction can be found the duty of the court is to sustain the classification embodied in the law."

And, at page 533:

"As we have held, gradation of the tax according to the number of units operated cannot be said to be so unreasonable as to transcend the constitutional powers of the legislature. The addition of a store to an existing chain is a privilege, and an increase of the tax on all the stores for the privilege of expanding the chain cannot be condemned as arbitrary; * * *."

Yet, if the characteristics of chain store operation considered in the *Jackson* case be determinative, they or their full equivalents are presented in the methods practiced by appellee. If anything, the gasoline and motor oil business is even more highly integrated than the business of chains handling other types of merchandise. Appellee and its various affiliates handle these products from the earliest stage of production to the final stage of retail distribution (R. 175). In the *Jackson* case, among others, the following so-called advantages were considered:

(1) Ability to make large purchases,
(2) The advantage of cash buying and discounts,

(3) Skill in buying,
(4) Supplying of numerous stores from a single warehouse,
(5) Abundant capital,
(6) Pricing and sales policies resulting in slightly lower prices,
(7) More rapid turnover,
(8) Cheaper and better advertising,
(9) Superior management,
(10) Standardization in matters of display,
(11) Standardization in store management,
(12) Special accounting methods.

The existence of practically all of these so-called advantages, or their equivalents, appears from the bill and stipulation. (1) Appellee refines its own products (R. 146-7), acquires the crude petroleum from an affiliate (R. 175). "The market of the plaintiff and its predecessor company for the distribution of petroleum products has always been state-wide in scope" (R. 23). Appellee's and the parent New Jersey corporation's business is not merely state-wide, but nation-wide, and practically world-wide (R. 208). Its general advertising covers the territory from Maine to Louisiana (R. 300). (2) "The plaintiff and its predecessor company always engaged in large-scale purchasing, refining and distribution of petroleum products." (R. 23). It is believed that buying from itself or affiliates is an advantage as great as that of obtaining cash discounts, and includes the equivalent of (3) Skill in buying (R. 175, 177). (4) Appellee has warehouses which serve respectively many retail distribution plants (R. 24, 158). (5) "For many years the plaintiff has had available the necessary capital to care for the development and operation of its business." (R. 24). (6) Appellee has a sales policy (R. 158, 162, 180). While it is denied that appellee is enabled thereby to sell at lower prices than other gasoline

companies (R. 25), it appears that there is no competition so far as prices are concerned, and appellee may fix prices from its New York office (R. 208) and, whether appellee follows prices set by others, or others follow appellee's prices, all gasoline distributors adopt substantially the same prices in the same territory (R. 177-8, 295-6) which prices are subject to frequent change (R. 208). It appears that under fear of price wars the smaller companies follow the larger ones in the matter of price (R. 296). In West Virginia appellee is the largest distributor of gasoline and motor oils (R. 199, 204). (7) The chain filling stations have the more rapid turnover (R. 167). (8) Appellee has an advertising policy simplified and unified (R. 26, 185), covering a wide territory from Maine to Louisiana (R. 300). (9) Appellee alleges in the bill that it has a trained operating personnel (R. 19). (10) There is standardization in the matter of display, the stations having uniform painting (R. 169), the products having trade names (R. 187). (11) There is specialization of products. "Plaintiff and its said predecessor company at all times have specialized and concentrated upon the production, distribution and sale of petroleum products." (R. 26). (12) There is standardization of management (R. 146-7,149,181), standardization in training of employees (R. 183), and unified, simplified, and standardized bookkeeping (R. 149, 163, 166). "All bookkeeping work in connection with customer's accounts is performed in the Branch Office." (R. 163).

Some immediate benefits from the systemization are shown by the record. The Standard and agency stations have larger man-hour sales than individual stations (R. 184), lower utility charges (R. 184-5). Perhaps the most significant fact is that, of the 4,453 filling stations operating in the State of West Virginia, 2,453, being approxi-

mately 55% of the whole, constituting the "chain filling stations" sell approximately 75% of all motor fuel, while the remaining 45% of stations, being the individual stations, sell only approximately 25% (R. 145). Included in the 2,453 chain stations are the 1,003 stations of appellee and the 1,119 stations of the four other gasoline companies operating more than seventy-five stations in the State (R. 143), and 331 stations of relatively smaller chains of from two to forty units each. The efforts of appellee to show that its business is not a chain business is, as was said in the case of *Liggett* v. *Lee,* 288 U. S. 517, 532:

> "This is but a reiteration of the contention made and overruled in *State Board of Tax Comrs.* v. *Jackson,* 283 U. S. 527. * * *"

and it was there held:

> "The decision in the *Jackson* case was based not upon any single feature of chain store management, but upon the ultimate fact of common knowledge, illustrated and emphasized by the evidence, that the conduct of a chain of stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually operated small store or department store; and that the difference between an integrated and a voluntary chain is fundamental."

In the light of the cases of *Board of Tax Comrs.* v. *Jackson,* 283 U. S. 527, *Liggett* v. *Lee,* 288 U. S. 517, *The Great A. & P. Tea Company* v. *Morrissett,* 284 U. S. 584, *The Great A. & P. Tea Company* v. *Maxwell,* 284 U. S. 575, it would be vain to comment upon each of the distinctions attempted to be set out by appellee. It may be significant to note that in the case of *The Great A. & P.*

*Tea Company* v. *Maxwell,* this Court affirmed the decision of the Supreme Court of North Carolina, in which case the plaintiff attempted to deny all advantages and benefits and to show lack of proportion between gross sales and the amount of tax as between chain units to which the tax applied and the individual units upon which no tax was imposed, although the defendant in that case did not even introduce evidence to deny the absence of the so-called advantages or the alleged inequalities. Also in the case of *Southern Grocery Stores* v. *South Carolina Commission,* 55 Fed. (2d) 931, the bill was dismissed upon the precedents of the *Jackson* case, *The Great A. & P. Tea Company* v. *Morrissett* and *The Great A. & P. Tea Company* v. *Maxwell,* even prior to the decision of the *Liggett* v. *Lee* case. Likewise the bill was dismissed in the case of *The Great A. & P. Tea Company* v. *Morrissett,* 58 Fed. (2d) 991, District Court, Eastern District of Virginia—three-judge court composed of Judges Parker, Northcott and Soper, Judge Soper dissenting—even prior to the decision of the case of *Board of Tax Commissioners* v *Jackson.*

Likewise here appellee shows certain individual or smaller chain stations which have, in some instances as large or larger gross receipts than some of the stations of the appellee, but which pay a smaller store tax. This contention was disposed of in the *Jackson* and *Liggett* cases, *supra.*

It is true that the per-unit gross sales of filling stations is less than the per-unit sales of other chain stores handling other lines of merchandise (R. 148, 171, 196). Judged by that standard, undoubtedly, in general, the store tax on filling stations is heavier than on other chains (R. 196). That filling stations are stores within the meaning of the act is considered hereafter. It is not

contended by appellant, however, that there may be no classification of stores. That filling stations are a class of stores which may be exempted from the chain store tax without the denial of the equal-protection of the laws to the stores not so exempted, has been held in the cases of *Liggett* v. *Lee,* 288 U. S. 517, and *Southern Grocery Stores* v. *South Carolina Tax Commission,* 55 Fed. (2d) 931. Various classes of stores might be selected for separate treatment. Perhaps grocery stores, hardware stores, clothing stores, drug stores, and others, might be given such separate treatment. That separate treatment might be comparatively lower taxes, heavier taxes, or exemption. But the fact that a broad classification of taxable subject matter might be sub-classified for separate treatment of the sub-classes, does not mean that the same treatment of all is inhibited, though the tax may appear to fall more heavily upon one of the potential sub-classes than upon another. This principle is well expressed in the case of *Botkin* v. *Welsh,* (S. D.) 251 N. W. 189, 214:

> "If the Legislature has power to treat certain classes separately for tax purposes, it would seem to follow that the Legislature, if it desires to do so, may treat them in the same manner. Suppose that the retailers in a state consist of twenty separable and distinct classes or groups and concede that each group is susceptible of distinct and separate tax treatment; then there is no logical reason why the Legislature need deal with these twenty classes by twenty separate laws, and if the Legislature sees fit to deal with them in one comprehensive law under the broader term 'retailers' this does not necessarily mean that the twenty included classes susceptible of separate treatment have lost their nature in that respect, or that all retailers have now become a class

> throughout which uniformity must prevail. It merely means that the Legislature, authorized to treat the twenty classes separately, has elected to treat them alike to the extent that the act so provides, but no farther, and there seems no logical reason why the Legislature, under those circumstances, could not provide in such an act for a tax of 2 per cent. on all retailers with the exception that class five should be entirely exempted, class seven should pay only 1 per cent., and class nine should pay 5 per cent."

So, here, gasoline stations may be susceptible of separate treatment. They are also suceptible of the same treatment. Except for the sale of articles other than petroleum products, gasoline stations are not competitive with stores selling other merchandise. Had the legislature seen fit to do so, it might have enacted a separate chain filling station act, or the chain store rates on filling stations might have been made higher or lower, not only according to gross receipts, but per unit, than on other classes of stores. Under the act involved here the tax per unit is the same. It may just as well be contended that there is denial of equal-protection to the G. R. Kinney Company's business because its average sales per unit are $33,000.00 while the average sales of Sears, Roebuck & Company are $140,000.00 (R. 196). "Gross sales" is not the basis of the classification here involved and such contention does not involve a matter of classification but the matter of the determination of the rate of taxes laid according to an established basis of classification.

**The Determination of the Rate of a Legal Tax Is for the Legislature.**

The appellee charges want of due process guaranteed under the Fourteenth Amendment because it is said that

the tax virtually confiscates the profits of appellee's marketing business, and (R. 17) charges that for the year 1932, not including the store tax, its taxes were 19.2% of its gross revenues in West Virginia. It is at once apparent that by far the greater part of the taxes claimed to be so paid by appellee is the gasoline gallonage tax. Of all the taxes paid in 1932, including corporation license, gross sales, motor vehicle license, and property taxes, including county and municipal taxes, amounting to $1,963,262.57, $1,817,257.84 [being the amount shown (R. 17) by item 3, License tax on filling stations and bulk distributing stations, and gallonage tax, of $1,818,476.84 less $949.00, being $1.00 for each filling station (1933), and $270.00, being $5.00 for each bulk plant (1933)] was the gallonage tax. The gallonage tax is not a tax on appellee but is an excise tax paid by the consumer. *(Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 480). That such is the character of the West Virginia gasoline gallonage tax is emphasized by the provisions of the gasoline tax statute (Section 20) by which refunds are made to the consumer and not to the appellee seller (R. 117). It is expressly provided (Sec. 17) that when the tax is collected it is the property of the State, and the statute makes it an embezzlement for any distributor collecting the tax not to remit it (R. 115). Thus appellee pays all other taxes of only $146,004.73 of which $118,764.43 is property tax, leaving other so-called indirect taxes of only $27,240.31 upon a gross business of $8,381,195.48 [being the gross revenue for 1932 of $10,198,453.32 (R. 9) less the $1,817,257.84 gallonage tax] or slightly less than one-third of one per cent. Even when the store tax of $240,173.50 be added this percentage is increased only 2.87 per cent, approximately, making the total tax, other than property taxes, in round figures, 3.2 per cent. A tax no greater than that can not be said to be unusually burdensome.

Although the above figures are taken from the figures of Standard Oil Company for 1932, and the so-called gross sales tax was increased by the legislature for the year 1933 approximately 76 per cent, the additional gross sales tax of $11,122.22 (R. 203) would make a negligible addition to the computed percentage.

However that may be, it little concerns this case whether the tax be light or heavy, so long as a lawful taxing power exists and is exercised for revenue purposes, the rate of taxation is a legislative and not a judicial question. This Court has had occasion to consider the charge of oppression in taxation in connection with federal taxes (*Veazie Bank* v. *Fenno,* 8 Wall., 533, 548; *McCray Refrigerator Company* v. *United States,* 195 U. S. 27, 51-61; *Patton* v. *Brady,* 184 U. S. 608, 623) as well as in connection with state taxes (*A. Magnano Company* v. *Hamilton,* 291 U. S. ___, 78 L. Ed. (Adv.) 712, 715; *Kehrer* v. *Stewart,* 197 U. S. 60, 70; *Postal Telegraph Co.* v. *Charleston,* 153 U. S. 692, 699-700), also a tax of the territory of Alaska (*Alaska Fish Company* v. *Smith,* 255 U. S. 44, 48), many times, and has uniformly held that a proper tax will not be disturbed merely because it appears to be burdensome, and has lately expressly held that there is no basic difference between the operation of the Fifth Amendment with respect to Congress and the Fourteenth Amendment with respect to the state legislatures in this respect. (*A. Magnano Company* v. *Hamilton,* 291 U. S. ___; 78 L. Ed. (Adv.) 712, 714). Manifestly the chain store tax here involved as related to gasoline and motor oil sales is not comparable to the tax of fifteen cents per pound upon butter substitutes considered in the *Magnano* case, or to the well known tobacco and liquor taxes, and compares very favorably with the production tax considered in the case of *Swiss Oil Company* v. *Shanks,* 273 U. S. 407.

**Even if the Rate of Taxation Were for the Court, Appellee Has Not Made a Showing of Confiscation.**

The bill alleges,

> "The plaintiff was incorporated under the laws of the State of Delaware on August 29, 1927, and thereupon acquired the business, property rights and good will of the Standard Oil Company, a corporation of the State of New Jersey." (R. 6).

As the stipulation of evidence was prepared it became apparent that Standard Oil Company of New Jersey, the Delaware corporation, appellee, did not succeed to the business, property rights, and good will of Standard Oil Company, the New Jersey corporation, but merely acquired that part of the New Jersey corporation's business relating to the refining and distribution of petroleum products in seven states, including West Virginia and the District of Columbia (R. 146, 175); that appellee was a mere subsidiary of Standard Oil Company, the New Jersey corporation, which held all of the capital stock of appellee (R. 146). Appellant had charged in his answer (R. 86) that appellee's business was not operated with the view of retail marketing profits, but profits from its general system, including production. When it was learned that appellee was merely a subsidiary in the refining and distribution business, appellant then filed amended answer and charged that appellee was a mere subsidiary of Standard Oil Company, the New Jersey corporation, which owned all of the capital stock of appellee and that the New Jersey corporation headed the Standard Oil group in a multiplicity of inter-related activities in the production, transportation and distribution of petroleum products, and that the purpose of Standard Oil Company, the New Jersey corporation, was the substantial control of the petroleum and natural gas markets, and that the inter-relations of the various com-

panies were such that the book records of the appellee did not disclose the true profits or losses of the Standard group for its West Virginia business. In connection with charges by appellee of confiscation, appellant called upon appellee for strict proof and a clear showing of the business of the Standard group (R. 127-8). Also, for the purposes of the stipulation of evidence, counsel for the appellant called upon counsel for appellee for this information (R. 211). The response was the refusal of the information, except in the very limited particulars which follow.

There is given the loss of Carter Oil Company—which, by stipulation is a subsidiary of appellee (R. 209)—on the petroleum furnished appellee's refinery at Parkersburg (R. 212), not, however, computed from actual costs and selling prices, but by the per barrel loss of Carter Oil Company on all oil handled by it (R. 212). It appears that Carter produces approximately one-third of the petroleum handled by it, and buys the remainder from other producers and royalty owners (R. 175). It is not shown that the producers and royalty owners from whom the Carter Company buys two-thirds of its petroleum are not affiliates of the Standard group or that they do not make profits therefrom. The proportionate part of Carter's petroleum produced and purchased which is delivered to Parkersburg does not appear. It is not definitely stated that there was loss on the petroleum delivered by the Carter Company to the Parkersburg refinery, or whether the losses were occasioned by sales made elsewhere at less favorable prices. To the contrary, it would appear that the losses of Carter Company were not occasioned by the sales to the Parkersburg refinery because (R. 175) it is stipulated:

"The price paid by the Parkersburg refinery for the oil so purchased by it is the posted price

> which the Carter Oil Company pays for its purchased oil, plus an additional five cents per barrel, which amount is intended to cover the expense of purchasing, handling and selling the oil."

Likewise, the computed profits to appellee from two of the pipe line companies transporting the petroleum to Parkersburg are given. This computed price does not show the amount of oil transported by the pipe line companies or the proportionate part delivered to Parkersburg or the comparative lengths of the hauls. From all that appears the per barrel profit may have been computed on a very short haul for most of the oil, while, obviously, the haul to Parkersburg is substantial and may have been much more profitable. It appears (R. 176) that appellee owned stock of Oklahoma Pipeline Company. In the other pipe line company for which some information was given, Ajax Pipeline Company, appellee and its subsidiary, Carter Oil Company, own less than voting control of the stock of Ajax Corporation, which, in turn, owns the stock of the Ajax Pipeline Company. It does not appear from the stipulation whether other affiliates of the Standard group made large profits from the transportation of petroleum to Parkersburg through Ajax Pipeline Company. It appears from the stipulation (R. 176) that the Parkersburg petroleum is transported through the Tuscarora Oil Company, Limited's pipe lines, the stock of which is held by individuals for the benefit of appellee. The profits or losses of Tuscarora Oil Company, Limited, in this connection are not shown. It also appears that the petroleum is transported through Illinois Pipeline Company, Southwest Pennsylvania Pipeline Company, and Eureka Pipeline Company, in which appellee has no interest. It does not appear that the New Jersey corporation or

other of its subsidiaries are not interested in said pipe lines or what profits, if any, were made from the transportation of the Parkersburg oil therethrough. (See amendment to findings of fact, R. 287). The stipulation shows (R. 176) that the transportation charges by all of said pipe lines are fixed by tariffs filed with the Interstate Commerce Commission. It does not appear whether the Interstate Commerce Commission has determined the proper tariffs or whether the pipe line companies have merely filed their tariffs with the Interstate Commerce Commission and such tariffs are followed without investigation by the Interstate Commerce Commission.

It is significant to note that in stating the various interests in said pipe line companies the stipulation purports to show only the interest of appellee and not the interest of Standard Oil Company, the New Jersey corporation, or other affiliates of the Standard Oil group. Except with respect to the Atlas Supply Company, in which it is stipulated (R. 176) that the stock is owned by Stanco, Incorporated, a corporation, the stock of which is entirely owned by Standard Oil Company, the New Jersey corporation, the interests of the New Jersey corporation or other Standard Oil affiliates are not shown, and it is nowhere stipulated or shown that other Standard affiliates do not have interests in the several pipe lines or in the producing and royalty-owning companies from which Carter acquires the petroleum not actually produced by it.

On the other hand the stipulation is clear that the prices upon which appellee computed from its books the figures showing its purported losses and gains are not actual cost prices, but are book prices throughout. First, the price paid by the Parkersburg refinery for oil purchased by it from Carter Oil Company is the posted price plus five cents per barrel (R. 175). While it is

which the Carter Co. pays for its purchased oil

stipulated, "It is agreed that there is at all times a recognized posted market price on the various grades of crude oil produced in the several oil-producing sections of the country, fluctuating with the supply of such oil, which price is adhered to by producers and dealers in buying and selling the same" (R. 177), even if it be concluded that the posted price which Carter Oil Company pays for its purchased oil is the same recognized posted market price, which is not definitely stated, it yet does not appear what relation that posted price has to the actual production cost of the Carter oil. It is stipulated (R. 207):

> "The prices at which petroleum is sold to the plaintiff's refinery at Parkersburg, West Virginia, are ascertained in the manner elsewhere herein set forth *and do not purport to be the full, actual cost of the production of such petroleum by the plaintiff's affiliates and no showing of such actual cost to any affiliate of the plaintiff in the production and transportation of petroleum delivered to the plaintiff is made in this stipulation.*" (Italics ours).

Next, the refinery prices at which petroleum products are billed from the Parkersburg and other refineries of the appellee to the marketing department "are fixed from time to time by the New York office of the company," and approximate those currently reported as open market prices in their respective regional market areas (R. 177). "The refinery billing prices of the company have not been based upon the cost of production in the company's refineries." (R. 177).

The posted prices at which motor fuels and motor lubricants are sold at appellee's stations and agency stations are determined from time to time at the plain-

tiff's principal office in the City of New York, and these prices are ordinarily changed from time to time during the year. During 1932 there were about eight changes, and in 1933, up to the time of the stipulation, there were about five changes including an increase of one and one-half cents during the month of May, 1933 (R. 208), which was after the enactment of the chain store act. It further appears that these retail posted prices are fixed by the principal gasoline companies, singly or with others (R. 295-6) and are in the same localities the same (R. 183-4). See particularly the stipulation taken from the case of *Ashland Refining Company,* being made a part of the stipulation in this case (R. 295, 296):

> "The larger companies from time to time designate what are known as the posted retail prices of gasoline. Among the larger companies this price is substantially uniform and plaintiff endeavors to conform thereto and adopt such posted price as its price. * * *"

On the other hand, in response to the demand of the appellant that full information concerning the business of the appellee Standard Oil Company, the New Jersey corporation, and all affiliates be given (R. 211-212) only the limited information above referred to was given, and it was stipulated that if witnesses competent to testify concerning the desired information be inquired of they would refuse to give the information upon the advice of counsel that such information was "immaterial to the matters involved in this cause," and that "Any information concerning matters outside of the marketing transactions of the plaintiff are therefore immaterial to the issues raised herein; that the details of other businesses and transactions carried on by the plaintiff and/or its affiliates, and profits and losses incurred therein, are

irrelevant to a consideration of the effect of the tax in question upon the marketing operations of the plaintiff." (R. 210).

In its findings of fact the trial court concluded that the stipulation was sufficient to determine that the figures from the company's books correctly show net profits and losses *of the business done at its stations in West Virginia* (R. 284), but further concluded (R. 286):

> "It may be well that the company in normal times derives a profit through its affiliation with other corporations engaged in producing or transporting oil, or through its own activities in the refining of oil in the State of West Virginia, but it does not appear that these transactions *affect the profit or loss of marketing the refined product at wholesale or retail in the state.* * * * *and it is upon the privilege of conducting this business that the store tax is imposed.*" (R. 286). (Italics ours).

Appellant does not here contend that the record does show other profits to appellee, its parent and affiliate companies, but simply that the record is in large measure silent upon the subject of whether profits or losses were made, and that, in alleging substantial confiscation, the burden is upon appellee to show such substantial confiscation, and that it has not borne this burden, when, admittedly, if such be the fact, the means of showing the same were at the disposal of appellee. Confiscation or oppression is not shown by one of a large number of affiliated corporations giving information concerning only a limited part of its business based upon so-called current prices, without at the same time showing actual costs and profits and/or losses of affiliates. Admittedly, appellee is little more than dummy corporation used as

an instrumentality for Standard Oil Company, the New Jersey corporation. Appellee does not even have independent stockholders. It is obvious that the appellee, being the largest gasoline distributing company in the State of West Virginia and being but one unit of Standard Oil Company of New Jersey, which is one of the largest, if not the largest, holding companies in connection with the petroleum industry in the United States, if not in the world, has great influence in determining what the various posted prices shall be from time to time, whether they be producers' prices, refiners' prices or retailers' prices; and that appellee is one of the large companies in West Virginia in a position to make retaliation upon the smaller companies (R. 296), and that no reasonable showing of substantial confiscation can be made by starting with an artificial refinery billing price from the Parkersburg refinery and showing losses or very limited profits from that point to the retail sale of such products, without at the same time making a full and honest disclosure of profits and losses of the Standard group between the production of crude petroleum and its delivery to the Parkersburg or other refineries from which the State of West Virginia is served. (Compare: *Dayton Power & Light Company* v. *Public Utilities,* 291 U. S. ___; 78 L. Ed. (Adv.) 832, 843; *Columbia Gas & Fuel Company* v. *Public Utilities Commission of Ohio,* 291 U. S. ___, 78 L. Ed. (Adv.) 885, 891; *Western Distributing Company* v. *Public Service Commission of Kansas,* 285 U. S. 119, 124; *Smith* v. *Illinois Bell Telephone Company,* 282 U. S. 133, 162.)

That appellee's business is conducted on the basis of its general business rather than its business strictly within West Virginia appears from the stipulation (R. 207), showing that affiliates produce sufficient petroleum in the State of West Virginia largely within one hundred miles

of the Parkersburg refinery to refine approximately 6,100,000 gallons of commercial motor fuel, and also produce in West Virginia 18,000,000 gallons of absorption gasoline, the combined production being sufficient to provide approximately fifty per cent of Standard's motor fuel requirements in the State of West Virginia (R. 204), when, as a mater of fact, none of these West Virginia products are used for appellee's West Virginia motor fuel business but are transported from West Virginia to other more distant markets largely for the use of affiliates, while the motor fuel requirements of appellee in West Virginia are supplied from petroleum produced in the mid-continent area necessitating large transportation costs.

Also, that appellee finds advantages in operating its many agency stations with respect to which it complains that the tax is particularly oppressive, appears from the fact that in operating the agency stations, a total allowance of three and one-half cents per gallon from posted price is allowed, being one cent rental and two and one-half cents commission to agent, while in selling the same products to individual dealers only three cents from the posted price is allowed (R. 168, 173). This one-half cent per gallon preference given agency stations over individual dealers would go a long way towards paying the taxes of which appellee complains.

That appellee Standard Oil Company of New Jersey, a Delaware corporation, is a separate corporate entity does not prevent inquiry into the related business affairs of other corporations, particularly the parent company, Standard Oil Company, a New Jersey corporation, when it appears that appellee is a mere instrumentality or adjunct of the New Jersey Corporation. As was aptly expressed in the case of *Federal Trade Commission* v.

*Thatcher Manufacturing Company*, 5 Fed. (2d) 615, 621, in quoting from the case of *United States* v. *United Shoe Machinery Co.*, 234 Fed. 127:

> " 'Courts of equity will look behind a corporate fiction, and if it clearly appears that one corporation is merely a creature of another, the latter holding all the stock of the former, thereby controlling it as effectively as it does itself, it will be treated as the practical owner of the corporation, when necessary for the purpose of doing justice.' "

See Corpus Juris, title "Corporations," Vol. 14, Sec. 26, page 62; Fletcher Cyc. of Corporations, Vol. 1, Sec. 45, page 63; Thompson on Corporations, 3d Ed., Vol. 1, Section 10, pp. 16-18.

**The Relation of the Tax Upon Filling Stations and Bulk Plants to the Purposes of the Act.**

In the lower court appellee insisted, and will no doubt insist here, that the tax falls so much more heavily, comparatively, upon its business than upon chains handling other lines of merchandise, that it does not bear a reasonable relation to the object of the legislature. The lower court (Opinion of Judge Soper, R. 264) adopted this view, quoting the observations of this Court in the case of *Ohio Oil Company* v. *Conway*, 281 U. S. 146, 159 (R. 255).

The object of the act was the raising of revenue by the imposition of graduated taxes upon multiple ownership and operation of stores. If filling stations and bulk plants are stores within the definition of that term as prescribed by the act, it would seem that the relation

between the application of the act and the object of the legislature is clear and direct.

We have found no decisions of this Court discussing the relation between the act and the object of the legislature in which such observation has been made with respect to the determination of the rate of the tax, and such observations appear to relate to the classification rather than to the determination of the rate of taxation.

By way of illustration, the case of *Ohio Oil Company* v. *Conway,* 281 U. S. 146, involved the classification of petroleum on the basis of gravity, and the imposition of ~~definite~~ rates of taxes accordingly. This basis of classification was sustained.

In *Royster Guano Company* v. *Virginia,* 253 U. S. 412, cited in the *Ohio Oil Company* case, under the Virginia statute an income tax was imposed upon all of the income of Virginia corporations, including income derived by such corporations without the State of Virginia as well as income derived from within the State of Virginia, so long as any part of the income was derived from within the State of Virginia. Although the corporation was organized in Virginia, if all of its business except the holding of meetings was done outside the State of Virginia, no tax was imposed. It was held in that case that there was no reasonable basis for the imposition of the tax on a corporation doing a small part of its business in the State of Virginia and the greater part of its business without the State, on the one hand, and the exemption of a corporation doing no business in the State of Virginia, on the other. The rate of taxation was not involved, but the classification. In *Louisville Gas Company* v. *Coleman,* 277 U. S. 32, 39, likewise cited, a question of classification was involved. This case involved a tax on mortgages having not less than

five years to run, while mortgages maturing in less than five years were wholly exempt. While in the opinion of the Court it was suggested that the rates of taxation might be graduated on the basis of the difference in the maturities of mortgages, the statute was held invalid because of an arbitrary classification, namely, the taxing of mortgages having more than five years to run and the total exemption of those for a lesser period. The case did not involve the rate of the imposition upon the basis of a valid classification.

In the case of *Airway Corporation* v. *Day,* 266 U. S. 71, likewise cited, there was involved a tax upon a corporation engaged in interstate commerce as well as in intrastate commerce. The tax was based upon the total authorized capital stock, without regard to the amount of the stock actually issued and without attempted apportionment between interstate business and intrastate business. This statute was held invalid because it was considered a burden on interstate commerce and, further, for the reason that mere authorized capital stock, regardless of the amount issued, could not constitute a reasonable measure for the imposition of an annual license fee of the character there under consideration.

In *Schlessinger* v. *Wisconsin,* 270 U. S. 230, this Court had under consideration an inheritance tax in which was incorporated a conclusive presumption of transfer in contemplation of death when the transfer was made within six years prior to death. The object of the legislature was obviously an inheritance tax and not a gift tax, and the Court concluded that the establishment of a conclusive presumption was so arbitrary as not to sustain the enactment. It was recognized that a rebuttable presumption might have been created. Had the conclusive presumption been sustained the result would

have been the enactment of a gift tax where the object of the legislature was the imposition of an inheritance tax. See also *Nichols* v. *Coolidge*, 274 U. S. 531.

The case of *Liggett* v. *Baldridge*, 278 U. S. 105, was also relied upon. This case did not involve a tax statute but involved a statutory requirement, purporting to be enacted for the promotion of public health, that only licensed pharmacists should own drug stores. The Court held that there was no relationship between the ownership of a drug store and the public health, since the management of the drug store as distinguished from its mere ownership might reasonably determine whether or not the public health was protected. This statute was a mere attempt to prohibit persons and corporations from engaging in a lawful business under a purported exercise of the police power which had no reasonable relation to the object sought to be attained thereby.

If the thought be that "the relation to the object of the legislature" requires that the tax or the rate of tax be determined by the commercial value of the privilege exercised under the act, or that the taxpayer must have some special benefit from the payment of the taxes other than the maintenance of general government, it is believed that the application of such observations to the case at hand is wholly without support.

In the case of *Nashville C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249, 268, in upholding a tax upon the storage of gasoline, the proceeds of which were by statute applied to the maintenance and construction of highways, upon a railroad company which did not use the highways, the Court observed:

> "• • • the constitutional power to levy taxes does not depend upon the enjoyment by the tax-

payer of any special benefit from the use of the funds raised by taxation."

It is believed that the classification involved in the case at bar is established by the decisions in the *Jackson* and *Liggett* cases, *supra,* and, the propriety of the classification being established, that the principles of the case of *Magnano* v. *Hamilton, supra,* are applicable, and, the purpose to raise revenue being clear and admitted, the rate of the imposition does not present a judicial question.

**State Questions.**

Since, should the Court determine that federal jurisdiction is presented, the Court may pass upon all questions involved, whether federal questions or not *(Louisville & Nashville R. R. Co.* v. *Garrett,* 231 U. S. 298, 303); and since upon appeal this Court may affirm the decree of the trial court from a consideration of the entire record even though the basis upon which the decision of the lower court was made be disapproved *(Stoffregen* v. *Moore,* 271 Fed. 680, 681), we here discuss briefly all state questions involved whether or not directly passed upon by the lower court.

## III.

**The Title of the Act.**

Appellee contends that the title of the act in question contains the word "stores" while the body of the act refers to "stores and mercantile establishments," and that the use of the phrase "mercantile establishments" in the body of the act, if given any further effect than were the word "stores" alone used, would be violative

of the provisions of Section 30 of Article VI of the Constitution of West Virginia, which provides:

> "No act hereafter passed, shall embrace more than one object, and that shall be expressed in the title. But if any object shall be embraced in an act which is not so expressed, the act shall be void only as to so much thereof, as shall not be so expressed, * * *."

This provision has been considered many times by the Supreme Court of Appeals of West Virginia. The interpretation by said court is found in the recent case of *Leonhart* v. *Board of Education,* 114 W. Va. ---; 170 S. E. 418, 420, wherein the court observed:

> " 'If the title of an act is broad enough to give a fair and reasonable index to all the purposes of the act, it is not necessary to descend to particulars in the title.' *State ex rel. Hallanan* v. *Thompson,* 80 W. Va. 698, 93 S. E. 810. The contents of an act need not be detailed in its title. *Brozka* v. *County Court,* 111 W. Va. 191, 160 S. E. 914. 'If under the one object expressed in the title other incidental or auxiliary objects appear in the act germane to the principal object, the act is valid as to such incidental auxiliary and germane objects. The universal rule of construction is that the title should be construed in its most comprehensive and liberal sense favorable to the validity of any provision of the act.' *State* v. *Haskins,* 92 W. Va. 632, 115 S. E. 720, 722. It is only where it is very clear that a provision of the act is not within the title, liberally construed, that such provision of the act should be held invalid. All of these considerations convince us that we would not be warranted in declaring any portion of the county unit act uncon-

stitutional because not sufficiently designated in the title of the act."

This decision is a culmination of a long line of decisions of the Supreme Court of Appeals of West Virginia to the same end, and accords with the general rule of interpretation of similar constitutional provisions. *County of Carter* v. *Sinton,* 120 U. S. 517-526; 30 L. Ed. 701-4. Whether or not the use of the words "mercantile establishments" has the effect of making more comprehensive the meaning of the word "stores," the title of the act meets the requirements of the provisions of Section 30 of Article VI of the Constitution of West Virginia to sustain the interpretation of the act in question as including gasoline filling stations and bulk plants.

## IV.

**Gasoline and Motor Oils Are Merchandise and the Bulk Plants and Filling Stations, Including Agency Stations, Are Stores and Mercantile Establishments Owned, Operated, Maintained and/or Controlled by Appellee.**

There are number of decisions involving the judicial determination of the question of whether or not filling stations are stores and whether or not gasoline and motor oils are ordinary articles of merchandise. As related to chain store taxation there are, to the best of our information, but two cases, other than the case at bar, passing upon this question. The one *Wadhams Oil Co.* v. *State,* 210 Wis. 448; 245 N. W. 646, on rehearing 210 Wis. 457; 246 N. W. 687, and *Midwestern Petroleum Corporation* v. *State Board of Tax Commissioners,* (Ind., 1933) 187 N. E. 882, rehearing denied 191 N. E. (Adv.) 153.

The Wisconsin and Indiana decisions reach opposite conclusions. These cases will be referred to in detail,

but before such consideration of these cases it is believed that a brief discussion of other cases considering filling stations as "stores" and gasoline and motor oils as ordinary merchandise may be helpful.

In the case of *Gunther* v. *Atlantic Refining Company*, 277 Pa. 289, 293; 121 Atl. 53, 54, a contract that "no store building should be erected on the property * * *" was involved. The Atlantic Refining Company proceeded to erect a building with outside appliances "to be used for the sale of oil, gasoline, etc." The Refining Company was enjoined. The Refining Company argued that the building contemplated was not a store within the meaning of the agreement. The court observed:

> "The word 'store' has been broadly defined as a place where merchandise of any kind is kept for sale: Standard Dictionary; 36 Cyc. 1326, and cases cited in footnotes; see also opinion of lower court, affirmed by this court, in *Hoffman* v. *Parker*, 239 Pa. 398,(86 Atl. 864), where it was stated that buildings outwardly designed, adapted and constructed for a trade might popularly be described as stores and would be understood as devoted to retail trade. The defendant proposed to use the premises for the purpose of retailing gasoline and oil for delivery from tanks constructed outside and in front of the building; that such use was for the purpose of trading and came within the designation of a store within the meaning of a clause restricting the premises to residential purposes can hardly be doubted."

In the case of *Mellitz* v. *Sunfield Co.*, 103 Conn. 177; 129 Atl. 228, 231, the restriction on the use of lots 2 and 3 involved was that "no building shall be erected thereon to be occupied for any purpose except stores and dwell-

ings; the store to be used for the sale of ordinary merchandise * * *." The restriction as to lot 1 limited the building to be erected thereon to a dwelling house and the occupancy to the purposes of a dwelling. The defendant on lot 2 conducted a store for the sale of automobile accessories and used lots 2 and 3 for its gasoline station for the sale of gasoline, oil and grease. Upon lot 1 defendant had constructed a crushed stone driveway used in connection with its business on lots 2 and 3 adjoining. The lower court refused the injunction against such use of any of the three lots. The Supreme Court of Errors of Connecticut affirmed the lower court in denying the injunction as to lots 2 and 3 but reversed the lower court and directed that the injunction issue as to lot 1. The court observed:

> "The restriction as to lots 2 and 3 is that no building shall be erected thereon to be occupied for any purpose except stores and dwellings; the store to be used for the sale of ordinary merchandise and the buildings not to contain more than one family beside the store. The sale of automobile accessories from this store located on lot 3 falls exactly within the terms of this restriction. So that the plaintiff's claim that the defendant has violated this restriction must be that the sale of gasoline, oil, and grease in the manner in which defendant's business is carried on is not that of the sale of ordinary merchandise, or that the manner of carrying on the business is not by means of a store. Merchandise is defined as every article of traffic customarily bought and sold for a profit. *Kohlsaatt & Co.* v. *O'Connell,* 255 Ill. 271, 99 N. E. 689, 690. The traffic in these articles of commerce is incredibly large. The automobile ministers to the necessities as well as the recreation and pleasure of a majority of our people. It has ceased to be a luxury, and become a neces-

> sity of modern life. The common understanding would include these articles of commerce within the designation of 'ordinary merchandise.' "

And referring to the case of *Gunther* v. *Atlantic Refining Co., supra,* and *City of Troy* v. *Harris, infra,* further observed:

> "These authorities and the common understanding agree that gasoline, oil, and grease sold for a profit are traffic in ordinary merchandise, and that any one dealing in them under the circumstances of the instant case is a merchant. Does the fact that the restriction is as to a store to be used for ordinary merchandise exclude the doing of this business by the agency of tanks and pumps outside the store? We think this too narrow a construction of this restriction. If the store were a grocery or fruit store, it would not cease to be a store if the major portion of the stock were kept outside the store. The same conclusion must follow as to many lines of business. Whatever is incident to, and a convenience to, the conduct of a store engaged in the sale of ordinary merchandise is permissible so long as it does not conflict with municipal regulation or become a nuisance. Whether the gasoline be sold from pumps located on the piazza of the store or located across the driveway passing the store, it is in either case a part of the business conducted in and from the store."

In the case of *City of Troy* v. *Harris,* 102 Mo. App. 51, 59, 76 S. W. 662, 665, it was held that a corporation selling oil drawn from stationary tanks owned by it and from a wagon tank driven about town is a merchant, within an ordinance defining a merchant to be a person

dealing in the selling of goods, wares and merchandise at any stand or place occupied for that purpose.

In the case of *Charleston Oil Co.* v. *Poulnot,* 143 S. Car. 283, 291; 141 S. E. 454, 457, considering a statute inhibiting the sale of merchandise on Sunday, the Court observed:

> "Under the definitions referred to in the authorities above cited, and in line with the former decisions of this Court, we think there can be no doubt that gasoline and motor oils are embraced in the term 'merchandise' as used in the statute."

In the case of *Abbott* v. *Steigman,* 263 Mass. 585, 588; 161 N. E. 596, 597, there was considered a covenant against the use of certain property for mercantile purposes. It was held that the sale of oil, tires and other automobile accessories in the building erected on the land was plainly a use for mercantile purposes.

In the case of *Gasoline Company* v. *St. Louis,* 326 Mo. 435, 445; 32 S. W. (2d) 281, 284, it was "conceded however, that one engaged in buying and selling gasoline is a merchant."

In the case of *Viquesney* v. *Kansas City,* 305 Mo. 488, 498; 266 S. W. 700, 703, a definition of the word "merchant" as "one making the business of buying and selling the commodities," was, where certain merchants were enumerated, construed as applying to the operators of filling stations, although not expressly mentioned.

In considering a Mississippi statute, in the case of *Craig* v. *Pattison,* 74 Miss. 881, 884; 21 So. 756, 757, the court held that the tax applicable to the business of

conducting a store was applicable to the business considered in said case, although the goods for sale were kept partly in a dwelling and partly in a meat house, and held that the business so conducted was a store within the meaning of the privilege tax imposed.

Appellee relies upon the case of *Wadhams Oil Company* v. *State*, 208 Wis. 318; 245 N. W. 646, on rehearing 210 Wis. 448, 246 N. W. 687, and the lower court followed this case. The decision in the *Wadhams* case purports to apply the well recognized and practically universal rule of statutory construction, that in the absence of any manifestation from the statute of other intent a word used in the statute shall be given its common, ordinary, accepted, popular meaning, which rule is stated in 2 Lewis' Sutherland Statutory Construction (2d Ed.), Section 390:

> "As a general rule the words of a statute are to be taken in their ordinary and popular sense unless it appears from the context or otherwise that they were used in a different sense."

We find no fault with this rule, but question the accuracy of its application in the *Wadhams* case, and in the opinion of the lower court in the case at bar, and believe that its accurate application in the case at bar will lead to the conclusion that filling stations and bulk plants are "stores" within the meaning of the act under consideration.

The only reason for the position taken by the Wisconsin court in the *Wadhams* case is the assumption of fact that:

> "• • • If one were to stop five hundred well-informed intelligent persons traveling into any city and ask them to stop at the first store or

> mercantile establishment where goods, wares, or merchandise were sold or offered for sale, it is quite probable that not a single one would stop at a filling station or service station such as is described in the plaintiff's complaint. * * *'' (245 N. W. 649).

The accuracy of the conclusion of the illustration may be seriously questioned. The position of the Supreme Court of Indiana in the case of *Midwestern Petroleum Corporation* v. *State Board of Tax Commissioners,* (Ind. 1933) 187 N. E. 882, 888, appears to be more plausible, wherein, in commenting upon the illustration used in the *Wadhams* case, it observed:

> "It is probably equally true that if five hundred persons were asked for a definition of the word 'store,' they would give substantially the dictinary definition above quoted."

The dictionary definition referred to was that found in Webster's Dictionary defining the word "store" in the commercial use as meaning "any place where goods are kept for sale, whether by wholesale or retail; a shop * * *." The intelligent persons referred to in the *Wadhams* case undoubtedly would know that definition or a reasonable equivalent thereto. It may just as well be assumed that none of the five hundred persons would stop at a wholesale cotton goods house. Many of them have no window display showing their wares, and yet it is not believed that any serious question could be raised to the inclusion of wholesale cotton goods houses in the definition of "store" found in the statute here under consideration. It must not be overlooked that the West Virginia Chain Store Act has its statutory definition of "store" included therein. Section 8 provides:

> "The term 'store' as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained and/or controlled by the same person, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale."

In the case of *Buchanan* v. *Louisville Coal & Coke Co.*, 98 W. Va. 470, 472; 127 S. E. 335, in considering the statutory definition of a ton as two thousand pounds in connection with local custom establishing a ton of two thousand two hundred and forty pounds, the court determined:

> " 'If a statute has given a definite meaning to any particular word no evidence of custom will be admitted to attach any other meaning to it.' "

(Under the Constitution of West Virginia, Section 5, Article VIII, it is the duty of the court to prepare a syllabus of the points adjudicated in each case, the section providing: "* * * and it shall be the duty of the court to prepare a syllabus of the points adjudicated in each case concurred in by three of the judges thereof, which shall be prefixed to the published report of the case.")

**It is not contended by appellant that words used in a statute must always be given the dictionary definition. On the other hand, it is believed that so far as words of common use and understanding are concerned, and the word "store" is such a word, dictionary definitions may safely be relied upon to set forth the common, ordinary, accepted and popular meaning of such words of common use. If the common dictionary definitions of words in**

common use cannot be relied upon, then where shall the legislatures look for the meaning of the words used by them? Who shall determine the popular meaning? Consider the very question here presented. In *Gunther* v. *Atlantic Refining Company, supra,* the court concluded that the building there considered, a filling station, might *popularly* be described as a store.

And in *Mellitz* v. *Sunfield Co., supra,* in referring to gasoline, oil and grease the court concluded: "The *common understanding* would include these articles of commerce within the designation of 'ordinary merchandise.'" Thus the Pennsylvania and Connecticut courts conclude that filling stations and gasoline and motor oils are within the popular meaning and common understanding of the words "stores" and "ordinary merchandise." These conclusions are supported by the ordinary dictionary definitions of the word "store" of common every day use and acceptation. On the other hand, the *Wadhams* case seems to stand alone, predicated upon what is apparently a misconception of the popular limitation of the word "store."

The decision in the *Wadhams* case appears to have been placed to a considerable degree upon the particular wording of the definition of "stores" under the Wisconsin statute. The definition of the word "store" as used in that statute was:

> "Every person, firm, corporation or association engaged in the business of operating or maintaining in this state under the same general management, supervision and ownership two or more stores or mercantile establishments where goods, wares or merchandise are sold or offered for sale at retail shall for the purposes of this section be deemed to be engaged in the chain store business." (245 N. W. 646, 649).

On rehearing (246 N. W. 688) the court observed:

> "If the Legislature had intended to be all-inclusive, other appropriate language might have been used. In the definition, it might have said, instead of a store or mercantile establishment 'a place,' and inserted after the word 'merchandise' the words 'of any kind,' and phrased the statute as follows: 'Every person, firm, corporation or association engaged in the business of operating or maintaining in this state under the same general management, supervision and ownership two or more places where goods, wares or merchandise of any kind are sold or offered for sale at retail shall for the purposes of this section be deemed to be engaged in the chain store business.'"

And concluded:

> *"So phrased, the statute would have included filling stations and many other establishments not within the terms of the act as we shall see."*

It is very significant that in the definition involved in the West Virginia statute the phrase *of any kind* is used and the definition expressly refers to "goods, wares or merchandise of any kind." Taking the view of the Wisconsin court in the *Wadhams* case it is not unlikely that had the court there had under consideration the West Virginia statute it would have concluded that filling stations were within the terms of the act.

The decision in the *Wadhams* case seems to be unsupported by reason, lexicology or precedent. The view adopted in the case of *Midwestern Petroleum Corporation* v. *State Board of Tax Commissioners,* (Ind., 1933) 187

N. E. 882, is supported by reason, lexicology and precedent, as is shown by the cases hereinbefore discussed, the dictionary definitions shown and the sound reasons expressed in the opinion, wherein, in commenting upon the previous decision in the *Wadhams* case, the Indiana court observed:

> "It should be accepted as the rule that non-technical words used in the title of an act, or in the act itself, will be construed according to their ordinary and accepted dictionary meaning, unless an intention to convey some other or different meaning can be gathered from the context. The definition of the word 'store' contained in the body of the act conforms almost exactly to the dictionary meaning, thus indicating the legislative understanding of the word, and it is notable that where similar legislation was enacted in other states where it was desired to exempt filling stations from the operation of the law, they were expressly exempted, which seems to indicate a belief that they would come within the meaning of the word 'stores' if not so expressly exempted.
>
> "It is also contended that because the statute uses the words 'in which goods, wares or merchandise * * * are sold' (section 8), and requires a license to be displayed 'in' the store, the act was not intended to apply and does not apply to establishments where the business is transacted outside of an inclosure and not under a roof. Webster's Dictionary says that the word 'in' is specifically used as indicating a point or place thought of as spatially surrounded or bounded'; and 'in this sense it is used by extension before words only indirectly or vaguely denoting physical surrounding.' To interpret the word as indicating a legislative intention that mercantile establishments that are not under a roof or not within

> an inclosure should not be subject to the requirements of the act would be to ignore the plain language of the act in which it is said, 'The term "store" as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments.'"

The Indiana court in the *Midwestern Petroleum* case had under consideration the exact defintion of "store" embodied in the West Virginia act, except the Indiana statute uses "or" and not "and/or" between the words "maintained" and "controlled," the West Virginia act apparently having been adopted from the Indiana act.

In the cases of *Liggett* v. *Lee*, 288 U. S. 517, 538-9; and *Southern Grocery Stores* v. *South Carolina Commission*, 55 Fed. (2d) 931, 933, the contention was made by the plaintiffs, not that gasoline filling stations were not stores, but that such stations were stores, and that the classification effecting their exclusion was abritrary and unreasonable, resulting in the denial of equal protection of the laws to other classes of stores subject to the tax. In the acts under consideration in those cases filling stations were expressly excluded. In overruling the contentions made in those cases this Court in the *Liggett* case, and Judge Parker speaking for the three-judge district court in the *Southern Grocery Stores* case, did not determine that filling stations were not "stores," but overruled the contentions for the reason that stores were susceptible of classification, and without definitely stating whether or not filling stations were stores, determined that filling stations were susceptible of separate treatment. In the *Southern Grocery Stores* case, 55 Fed. (2d) 931, 933, it is observed:

> "Such stations as a general rule sell only gasoline and other articles of merchandise upon which

> the state collects a heavy excise tax, and it was doubtless for this reason that they were exempted from the tax in question."

Gasoline is in that decision recognized as merchandise, and the language in each opinion is susceptible of the interpretation that filling stations were at least impliedly recognized as stores, which but for the specific exemptions would have been included within the provisions of the respective acts.

If gasoline be merchandise, and this would seem to be true beyond question, the conclusion that the word "store," within the meaning of this act, defined by the act as "any store or stores, mercantile establishment or establishments * * * in which goods, wares or merchandise *of any kind* are sold, either at retail or wholesale," includes gasoline filling stations and bulk plants is inevitable, unless violence be done to the express wording of the statute.

Under ordinary dictionary definitions, which all of the courts in the other cases, other than the Wiconsin court, have recognized as the popular and common understanding meaning of the word "stores," the meaning of that word as used in the statute in question should be clear without the necessity of resorting to extrinsic evidence. However, the plaintiff in its bill charged specifically that it was not the legislative intent to include filling stations within the meaning of the word "stores." (R, 12). If any evidence of the legislative intent other than that found in the words of the statute be pertinent, the journal of the West Virginia Senate shows that while the bill was pending before that body an amendment was proposed, "*Provided, however,* that the term 'store' shall not include filling stations engaged

exclusively in the sale of gasoline and other petroleum products." (R. 119). The proposed amendment was acted upon by the Senate and the amendment was rejected: "So a majority of those present and voting, not having voted in the affirmative, the motion did not prevail." (R. 122). (See *United States* v. *United Shoe Machinery Co.*, 264 Fed. 138, 174, Appeal Dismissed, 254 U. S. 664; *U. S.* v. *St. Paul, M. & M. R. Co.*, 247 U. S. 310, 318; *Pennsylvania Ry. Co.* v. *International Coal Co.*, 230 U. S. 198, 199; *Finlayson* v. *Shinnston*, 113 W. Va. 434; 168 S. E. 479; Corpus Juris, Title, "Statutes," Vol. 59, Section 605, page 1019).

Hereinbefore we have argued that filling stations are stores within the meaning of the act under consideration, considering the sale of gasoline and motor oil alone. The record shows that the filling stations of appellee also sell automobile tires, batteries, spark plugs and automobile accessories and supplies generally (R. 148). While the trade in the articles of merchandise other than gasoline and motor oil may be a comparatively small part of the gross business (R. 148), in the aggregate such business is appreciable. The agency stations also handle such other articles, though appellee does not admit that for the handling of such other articles of merchandise the agents are in fact agents of appellee. Such agents in handling other articles acquire and sell the same under contracts filed as exhibits (R. 168). It is believed that under the decisions hereinafter referred to, under the next following sub-title, it will appear that the contracts are in reality agency contracts.

**The Stations and Bulk Plants Are Those of Appellee.**

That the so-called company stations and bulk plants are owned, operated, maintained, and controlled by appellee is stipulated (R. 150).

While it is not directly stipulated that the agency stations are so operated by appellee (R. 150) it is stipulated that the petroleum products there sold remain the property of appellee and that the persons in charge of the stations for the sale of such products are the agents of appellee (R. 148, 168).

Judge Soper in the opinion of the court (R. 242) said:

> "The control of the plaintiff of all of these stations is so complete that the plaintiff does not deny that they are operated by it within the meaning of the act."

On all of these stations appellee has leases (R. 49, 58) and the agency contracts are terminable at will on three days' notice, (R. 57, 66). These features show the control of these stations by appellee. As was held in the case of *Gulf Refining Company* v. *Rogers* (Tex.), 57 S. W. (2d) 183, 186, in discussing the liability of Gulf Refining Company for personal injuries occasioned by conduct of one operating a station under a lease and a so-called dealer agreement:

> "By reserving the right to terminate the contract at will, it retained the means of compelling submission to its orders."

In the case of *Greene* v. *Spinning* (Mo.), 48 S. W. (2d) 51, 57, involving the operation of a filling station under a so-called "authorized service station agreement," wherein it was contended by the oil company that the operator of the station was an independent contractor, the court observed:

> "One of the main criterions, if not the chief one, as to whether the relationship of respondeat

> superior exists, is the right to control, and it is not a question as to whether that control is actually assumed but whether it exists. 2 C. J. p. 424."

See *Magnolia Petroleum Co.* v. *Johnson,* 149 Ark. 553, 556; 233 S. W. 680, 681; *Barnes* v. *Standard Oil Company,* 167 Wash. 609, 618; 9 Pac. (2d) 1095, 1097; *Maryland Casualty Co.* v. *Kent,* (Tex.) 271 S. W. 929, 931; *Louisiana Oil Corporation* v. *Rayner,* 159 Miss. 783, 793-4; 132 So. 739, 742; *Gulf Refining Co.* v. *Huffman et al.,* 155 Tenn. 580, 588; 297 S. W. 199, 201; *Angell* v. *White Eagle Oil & Refining Company,* 169 Minn. 183, 187; 210 N. W. 1004, 1005-6; *Wilcox & Gibbs Sewing Machine Co.* v. *Ewing,* 141 U. S. 627, 636.

**Bulk Plants.**

The contention was made below that the bulk plants are only warehouses and that no substantial sales are made at the bulk plants but only deliveries made therefrom on orders or commitments previously taken through the branch office (R. 165). It appears that in addition to supplying its own and its agency stations from the bulk plants, appellee supplies individual dealers, commercial and industrial consumers (R. 163). The gasoline supplied such individual dealers and commercial consumers is approximately one-third of all gasoline sold by appellee (R. 153). The fact that orders may have been taken in advance for the greater part of these products does not deprive the bulk plants of their character as places at which merchandise is sold. As was said in *Midwestern Petroleum Corporation* v. *State Board of Tax Commissioners,* (Ind.) 187 N. E. 882, 889:

> "It asserts that the law does not apply to its bulk stations, which are not stores but merely

storage plants or warehouses from which distribution is made for the purpose of supplying appellant's own service stations and making delivery to customers. It is alleged that it maintains an office, and that its wholesale sales are made by telephone or mail or personal contact at this office, which is not situated at the same place as its so-called bulk stations, and that, therefore, no merchandising is done at the bulk places. We cannot take the contention seriously. If it could be sustained, every wholesaler or retailer who transacts business by accepting orders and making deliveries might detach his office from the place where his merchandise is stored and thus exempt himself from the operation of the law."

## V. AND VI.

**The Act Does Not Violate the Provisions of the Due-Process Clause (Section 10, Article III) or the Equal-and-Uniform Clause (Section 1, Article X) of the Constitution of West Virginia, Neither Requiring Abstract Equality or Uniformity In Taxation, Both Permitting Proper Classification.**

Section 10, Article III of the Constitution of West Virginia, 1872, provides:

> "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."

The pertinent provisions of Section 1, Article X of the Constitution of West Virginia (as amended November 8, 1932, set out in full, R. 32-33) are:

> "Subject to the exceptions in this section contained, taxation shall be equal and uniform

> throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. * * * (Here follow provisions for classification of property for ad valorem taxes) * * * The legislature shall have authority to tax privileges, franchises, and incomes of persons and corporations and to classify and graduate the tax on all incomes according to the amount thereof and to exempt from taxation, incomes below a minimum to be fixed from time to time, * * *."

The provisions of said Section 1, Article X prior to the amendment were:

> "Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of equal value; * * * The Legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations."

Prior to the adoption of the amendment to said Section 1, Article X the subject of the classification of privileges and occupational taxes under the West Virginia Constitution was considered in the following cases:

In *Sperry & Hutchinson* v. *Melton*, 69 W. Va. 124; 71 S. E. 19, there was involved a license tax of five hundred dollars "on the business of selling to merchants 'trading stamps, premium stamps, or stamps or certificates of like nature or character,' and on the business of redeem-

ing such stamps or certificates in money or goods," the Court observed (69 W. Va. 125):

> "It is entirely legitimate to tax a privilege, business or occupation. Of course there must be reasonable classification, and no unjust discrimination. The tax must be equal and uniform in relation to all persons of the same class. But where a tax is imposed in compliance with these principles, no excuse for it need be sought under the police power."

And (69 W. Va. 127) further observed:

> "The tax extends to all of a class. Every person in the particular vocation must pay it. So it has been made to conform to the rule for reasonable classification, and for equality and uniformity. There is no semblance of discrimination in favor of one person engaged in the business as against another engaged in the same business. Trading stamp merchants, if such they may be called, or trading stamp dealers and redeemers, surely stand in a novel and distinct class by themselves. They do a business that is quite different from ordinary merchants. They are plainly distinguished from store-keepers who sell for cash or credit and deal in goods after the ordinary methods."

On page 128 it was further observed:

> "The rule for reasonable classification has been fulfilled by the act fixing the tax in question. 'The power of the state to distinguish, select and classify objects of taxation has a wide range of discretion. Classification must be reasonable, but there is no precise application of the rule of

> reasonableness, and there cannot be an exact exclusion or inclusion of persons and things.' 1 Cooley on Taxation (3rd Ed.) 76."

It was also alleged that the tax was so burdensome that it prevented the Sperry & Hutchinson Company from making any profit on the business which it conducted in the City of Charleston. The Court concluded (69 W. Va. 128):

> "The Legislature had the power to select and justly tax the trading stamp business; and the presumption that it has placed a reasonable tax thereon has not been overthrown. The tax, as far as appears in this case, does not contravene any provision of the State Constitution or the Fourteenth Amendment to the Federal Constitution."

In the case of *Eureka Pipe Line Company* v. *Hallanan*, 87 W. Va. 396; 105 S. E. 506, the Supreme Court of Appeals of West Virginia had under consideration a privilege tax upon persons engaged in the transportation of crude oil or petroleum or natural gas by pipe lines. The act did not require the privilege tax from those engaged in the business of transporting oil or gas through pipe lines under ten miles in length or from those engaged in transportion other than through pipe lines, such as in tank cars by rail. The complainants contended that for this reason the act denied the equal protection of law guaranteed by the Fourteenth Amendment to the Federal Constitution (87 W. Va. 413). The Court held (Point 6 of the Syllabus):

> "The classification, for the purpose of taxation, of pipe line companies engaged in the business of transporting oil and gas into those whose

> systems are under ten miles in length, and those whose systems are over ten miles in length, is founded upon a substantial distinction, and is not violative of that clause of the fourteenth amendment to the Constitution of the United States guaranteeing to all persons the equal protection of the laws, nor of section 1 of article 10 of the Constitution of this state, the tax imposed applying alike to all in the same class."

And, in the body of the opinion (87 W. Va. 411) it was observed:

> "It is uniformly held that notwithstanding, by the constitution of a state, taxes must be levied by equal and uniform laws, and that the equal protection of the laws is guaranteed by the fourteenth amendment of the Federal Constitution, a state in the exercise of its taxing power may classify the subjects of taxation within its limits, and so long as the classifications thus made have a reasonable basis for their existence, and the tax imposed upon each member of each class is uniform, the same does not violate such constitutional limitations."

The contention was also made that the act was confiscatory. The Court held (87 W. Va. 413):

> "The contention made by the pipe line company that the act is confiscatory of its property is without merit. As we have construed the act, it does not appear that it will place any unreasonable burden upon the business in which this company is engaged, and if it should be ascertained that such is the case relief would no doubt be granted to it by proper application to the Public Service Commission for authority to increase its rates.

> The concern of the courts ordinarily is only as to the power of the legislature to impose the tax. The extent to which it may go is ordinarily a question for the legislature to determine, and so long as the tax imposed does not exceed the value of the privilege granted the courts will not ordinarily interfere to enjoin it upon the ground that it is unreasonable or confiscatory."

In the case of *Hope Natural Gas Company* v. *Hall*, 102 W. Va. 272, 135 S. E. 582, the Supreme Court of Appeals of West Virginia had under consideration the gross sales tax of West Virginia of 1925 imposing an occupation or privilege tax upon various classes of business measured by the application of varying percentages according to the classes of businesses upon the gross sales of the several businesses with a uniform exemption of $10,000 from the gross sales. The Court held (102 W. Va. 272, Point 1 of the Syllabus):

> "Chapter 1 of the Acts of the Legislature of West Virginia, passed at the Extraordinary Session, 1925, violates neither the State nor the Federal Constitution."

And, Syllabus 2:

> "Within reasonable limits the State Legislature may classify various occupations for taxation and may impose different specific taxes thereon, provided the enactment applies alike to all within each class."

The Court noted (102 W. Va. 275):

> "The plaintiff's main contentions are, that this Act purports to tax interstate commerce and

> violates Art. 1, Sec. 8 of the Federal Constitution; that the Act denied to plaintiff the equal protection of the law and violates the Fourteenth Amendment of the Federal Constitution, and that the taxes sought to be imposed by the Act are not equal and uniform, and are in violation of Art. 10, Sec. 1, of the Constitution of West Virginia."

The Court followed and quoted from the case of *Bell's Gap Rr. Co.* v. *Pennsylvania,* 134 U. S. 232, and other decisions of the Supreme Court of the United States of the same tenor, and concluded (102 W. Va. 278):

> "The foregoing decisions uphold the right of the legislature to classfy the subjects of taxation. When the right to classify is conceded, it necessarily follows that the legislature has the right to select the differences upon which the classification will be based. *Citizens Tel. Company* v. *Fuller,* (229 U. S. 322). No proof is offered that the classification of the statute is unreasonable. The statute makes no discrimination in favor of one as against another of the same class. We therefore see no repugnance in the statute to the Fourteenth Amendment."

The opinion further discussed specifically the deduction of $10,000 from the values or from the gross income taxed, and observed:

> "Statutory exemptions from taxation are generally upheld when they apply alike to all property of the same class, and are not unreasonable or arbitrary. * * * 'If the law operates upon every person within the relation or circumstances provided for, it is sufficient as to uniformity.' *McAunich* v. *Rr. Co.,* 20 Iowa 338."

The *Hope* case was appealed to the Supreme Court of the United States and affirmed, *(Hope Natural Gas Company* v. *Hall,* 274 U. S. 284) and this Court, in commenting upon the equal protection of laws, observed (page 289):

> "The claim that equal protection of the laws has been denied rests upon the assertion, first, that an unlawful tax has been imposed upon the gross proceeds from sales regardless of their place and, second, that the exemption of $10,000 from gross income by section 2h creates undue inequality. The true meaning of the statute and the thing actually taxed oppose the first assertion. We cannot say that the legislature acted either arbitrarily or unreasonably by authorizing the deduction. Nothing indicates a purpose to extend different treatment to those of the same class; no actual unreasonable inequality has been shown. Plaintiff in error is permitted to deduct $10,000; the same privilege, and nothing more, is extended to all other producers. *Lake Superior Mines Co.* v. *Lord,* 271 U. S. 577 (70 L. ed. 1093, 46 Sup. Ct. Rep. 627); *Swiss Oil Corp.* v. *Shanks,* 273 U. S. 407."

The tax considered in the case of *Sperry & Hutchinson* v. *Melton,* 69 W. Va. 124, was also considered by the Circuit Court of Appeals, 4th Circuit, in the case of *Sperry & Hutchinson Company* v. *Blue,* 202 Fed. 82. Judge Rose in writing the opinion referred to the case of *Sperry & Hutchinson Company* v. *Melton,* 69 W. Va. 124, and (202 Fed. 85) set forth the figures presented in both cases by the Sperry & Hutchinson Company in asserting that the tax was confiscatory of its business:

> "The Supreme Court of Appeals understood the bill before it as alleging that the Stamp Com-

pany if it was required to pay the tax could not carry on its business in Charleston, Kanawha County, at a profit. What that bill said was that the Stamp Company's total receipts from its business in that county was or would be $7,500. If it paid the tax, its expenditures would be $7,665. With the bill in the pending case were filed certain exhibits. From them it appears that in a period of a little over three years the Stamp Company's receipts in Charleston aggregated $19,800.54, its expenditures $21,291.40. Of these expenditures $1,500 were on account of the tax now assailed, and an additional $1,000 on account of the municipal tax levied by an ordinance of the city of Charleston. These figures do not differ widely enough from those before the state court to justify us in assuming that had they been before that court its conclusion would have been different from that at which it in fact arrived. The figures in the exhibits when analyzed do not show that the tax is prohibitory. During the part of the calendar year 1908 in which it was carrying on business in Charleston, and during the whole year of 1909, its receipts footed up $8,064.97. Its expenditures, exclusive of either the state or municipal license tax, were $8,913.64. That is to say, if it had paid no such tax, it would still have lost $848.67. In 1911 its receipts were $5,481.65. Its expenditures, other than those for license taxes, $3,881.95. That is to say, but for the tax it would have made a profit of $1,599.70. The state tax which is here assailed is $500 per year. The municipal tax is of a like amount. The Stamp Company could during the year 1911 have paid both of these taxes, and still have cleared $599.70, which is about 10 per cent. of its gross receipts. So far as these figures show anything, they strongly suggest that in the first months and years of the business in a particular locality money is lost.

> This is not a phenomenon peculiar to trading stamp companies. After the business has once been well established, it becomes profitable. Possibly it may become so profitable that it will be able to pay the license tax or taxes and still make money."

The Court further noted the observation made in the decision of the Supreme Court of Appeals of West Virginia (69 W. Va. 124):

> "The Supreme Court of Appeals, in the course of its opinion, said that the Stamp Company did not say that other persons might not be able to carry on the business at a profit. It merely alleged that it could not. In the present bill the Stamp Company says that other trading stamp concerns had tried to pay the tax and do business in West Virginia, and that they had, one and all, given it up as unprofitable. It asserts that none could succeed where it failed, and that it would be successful when many or most others would go to the wall. It explains that it feels justified in so stating because it has had a wider experience and has abler management and larger capital than any other person or corporation in the same business." (202 Fed. 86).

However, the Circuit Court of Appeals (202 Fed. 88) inquired:

> "Has this court, or any court, the right to say that a tax may not be levied because in the judgment of the court the amount is so large that it could not reasonably have been intended to produce revenue?"

and reveiwed at length a number of cases which we have cited in this brief to the effect that the responsibility of

the legislature for the imposition of a tax alleged to be oppressive is to the people and not to the courts, including *Kehrer* v. *Stewart,* 197 U. S. 60; *Postal Telegraph Company* v. *Charleston,* 153 U. S. 699; *McCray Refrigerator Co.* v. *United States,* 195 U. S. 27; *Austin* v. *Aldermen,* 7 Wall., 694, and concluded:

> "The Constitution of the United States effectively prevents many forms of injustice, even when perpetrated under the guise of legislative acts. It does not prevent all of them. It cannot, without substituting the judicial for the legislative judgment and discretion in some matters in which the public weal requires that the legislative, rather than the judicial, decision shall be conclusive." (202 Fed. 89).

It is believed that Judge Rose's opinion for the Circuit Court of Appeals is very pertinent here inasmuch as the opinion was expressed in connection with the consideration of a statute of West Virginia which had also been considered by the Supreme Court of Appeals of West Virginia, both courts arriving at the same conclusion, and the questions of classification and alleged confiscation under the Constitution of West Virginia as well as the Constitution of the United States being involved.

From the decisions above referred to it would seem that under the provisions of the West Virginia Constitution prior to the recent amendment, in so far as the application of the due-process and equality-and-uniformity provisions of the West Virginia Constitution to taxing statutes are concerned, the interpretation of the Supreme Court of Appeals of West Virginia has been in entire accord with the interpretation of the Supreme Court of the United States of the corresponding provisions of the Federal Constitution, the Supreme Court of Appeals of West Virginia having repeatedly followed and

quoted from decisions of the Supreme Court of the United States; and that, with respect to classification, the Constitution of West Virginia is not violated so long as all persons similarly circumstanced are treated alike, and with liberal regard for the legislative right to make the classification and determine the rate of imposition.

With respect to the rate of the tax under the Constitution of the State of West Virginia, the observation in the case of *Sperry & Hutchinson* v. *Melton,* 69 W. Va. 124, 127, is particularly apt:

> "The amount of the tax, judged in connection with what we may personally think about the opportunities and results in the trading stamp business, cannot properly be raised for decision. * * *"

Also the observation in the case of *Eureka Pipe Line Company* v. *Hallanan,* 87 W. Va. 396, 413:

> "The concern of the courts ordinarily is only as to the power of the legislature to impose the tax. The extent to which it may go is ordinarily a question for the legislature to determine, and so long as the tax imposed does not exceed the value of the privilege granted the courts will not ordinarily interfere to enjoin it upon the ground that it is unreasonable or confiscatory."

There is no decision of the Supreme Court of Appeals of West Virginia invalidating any tax statute because of alleged oppression. Just as with respect to the Fourteenth Amendment the Supreme Court of the United States holds that the rate of taxation is a legislative matter, for which, in case of abuse, the legislature is

responsible to the people and not to the courts, so with apparent uniformity in interpreting the state statutes, the state courts hold that it is not their province to determine the reasonableness or unreasonableness of the rate of a tax where the power to tax exists, in the absence of express constitutional limitation.

See *Interstate Company* v. *Richardson,* 177 Ga. 9, 12; 169 S. E. 373, 374, wherein an occupational license tax of $500.00 on vendors of merchandise operating on trains was held not discriminatory, confiscatory or violative of constitutional provisions guaranteeing protection of property, due process, and equal protection, notwithstanding none of such vendors in the state were earning sufficient profits to pay the tax, and *Fleischmann Co.* v. *Conway,* 168 La. 547, 122 So. 845, wherein a tax of ten cents per pound upon the sale of malt extract was sustained as a license tax though the evidence showed that the malt extract could not be sold without loss with such tax imposed.

In the case of *Erwin* v. *City of Omaha,* 118 Neb. 331, 224 N. W. 692, an occupational tax of $15.00 per day upon operators of rolling stores was sustained.

There are a few cases of state courts striking down municipal ordinances because the taxes thereunder have been considered too burdensome, but the courts are careful to note that for obvious reasons, among them that in the absence of express constitutional limitation the legislature has inherent power to tax, while the city council has only such power as has been delegated by the legislature, the principles applicable to the consideration of revenue ordinances enacted by a city council are quite different from those applicable to a revenue measure enacted by a state legislature.

In *Interstate Company* v. *Richardson,* 177 Ga. 9, 13, 169 S. E. 373, 375, it was observed:

> "The cases of *Postal Telegraph-Cable Co.* v. *City of Cordele,* 141 Ga. 658-664, 82 S. E. 26, *Atlantic Postal Telegraph-Cable Co.* v. *Savannah,* 133 Ga. 66, 65 S. E. 184, *Morton* v. *Macon,* 111 Ga. 162, 36 S. E. 627, 50 L. R. A. 485, and a number of similar cases cited by diligent counsel for the plaintiff, related to municipal ordinances imposing license taxes. It must be borne in mind that the tax which we are now considering was not the result of a municipal ordinance, but of an act of the state Legislature, and the law recognizes a marked difference between the two."

See also: *A. Magnano Co.* v. *Dunbar,* 2 Fed. Supp. 417, 421-2, wherein it is observed:

> "The reasonableness of the revenue act is not open to judicial review unless the organic law is violated, but the reasonableness of a municipal ordinance, except where it conforms strictly to express and specific legislative grant, is more amenable to judicial review and determination. *Roach* v. *Ephren,* 82 Fla. 523, 90 So. 609; *State* v. *Wilson,* 101 Kan. 789, 168 P. 679, L. R. A. 1918B, 374."

The Supreme Court of Appeals of West Virginia recently considered a case in which it was contended that since the adoption of the amendment, to Section 1, Article X of the Constitution of West Virginia, *supra,* occupation and privilege taxes might no longer be classified. *Laing* v. *Fox,* West Virginia, 1934, not yet reported. This case involved the contention that the occupational tax there involved, if an occupational tax,

violated the amended section because it exempted the occupations of horticulture, agriculture and grazing, and, if an income tax, could be classified or graduated only as to amount and not as to source. The act under consideration was a part of the gross sales tax considered in the *Hope Natural Gas Company* v. *Hall,* 274 U. S. 284, amended. It was also charged that the tax violated the provisions of the Fourteenth Amendment to the Federal Constitution and denied the plaintiff the equal protection of the laws and deprived him of property without due process of law. The Supreme Court of Appeals of West Virginia considered at length the decisions of the Supreme Court of the United States and quoted with approval from the opinion of Chief Justice Hughes in the case of *Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527, in disposing of the contention that the tax in question was violative of the provisions of the Fourteenth Amendment to the Federal Constitution and, in commenting upon the contention that the act violated the tax amendment to the Constitution of West Virginia, observed:

> "Does the exemption violate the tax amendment to the Constitution wherein it provides that 'the legislature shall have authority to tax privileges, franchises and incomes of persons and corporations and to classify and graduate tax on all incomes according to the amount thereof, and to exempt from taxation incomes below a minimum to be fixed from time to time?' It is urged by counsel for plaintiff that as the amendment confers upon the Legislature authority only to classify and graduate tax on incomes, it is without power to classify privileges and franchises. A sufficient answer to this contention is that the Legislature is inherently vested with plenary powers in the absence of explicit constitutional

> inhibition. 'Whether the Legislature has a certain power (not directly withdrawn) is not to be decided simply by marshalling the reasons for and against and then determining on which side is the weight of argument. The negation of the power must be manifest beyond reasonable doubt.' *State Road Commission* v. *County Court of Kanawha County,* 112 W. Va. 98." (175 S. E. 354, 359).

Thus the Supreme Court of Appeals of West Virginia has indicated its interpretation that the recent amendment to Section 1, Article X of the Constitution of West Virginia has not changed the previous provisions of the Constitution of West Virginia with respect to due process of law or equality and uniformity in connection with the classification of the subject matters of taxation as previously declared in the cases of *Eureka Pipe Line Company* v. *Hallanan, Sperry & Hutchinson* v. *Melton,* and *Hope Natural Gas Company* v. *Hall, supra.*

It would, therefore, seem to be clear that the act in the case at bar is not violative of any provisions of the Constitution of West Virginia.

**Double Taxation**

In the lower court appellee insisted that since it is required to pay the gasoline gallonage tax and the license taxes included therein, being $1.00 for each filling station and $5.00 for each bulk plant (Section 2, R. 106-7) the collection of the general store tax under the act here in question would constitute unconstitutional double taxation.

The gallonage tax is an excise paid by the consumer, and the so-called license taxes imposed under the gasoline tax statute are no more than mere registration fees

of the dealers in gasoline for the more effective administration of the act in collecting the gallonage taxes. The gasoline tax relates to the sale of the single commodity, gasoline. The store tax is a tax on the operation of a store, regardless of the kind, or of how many kinds, of merchandise may be there sold. In West Virginia, as in most of the states, there have been various specific taxes upon the sale of particular commodities, for instance, tobaccos and drugs. It would hardly be suggested that the payment of such specific taxes would preclude the imposition of a general tax on the operation of a store in which such commodities are sold.

Under the subject "Two or more license taxes or fees —General rule," in Cooley on Taxation (4th ed.), Vol. I, Section 233, page 495, it is said:

> "A person engaged in several distinct occupations or businesses in the same city or town may be required to pay a license tax for each, but power to tax a business does not include power to levy a tax upon the particular elements or operations which go to make up the business. So it is no objection to a license that it imposes a fee for regulation and also a fee for revenue, either as one fee or two. A second license tax is not invalid as double taxation, since the tax may be decreased or increased. A fortiori, license fees, where not for the same thing, do not constitute double taxation. So it is competent to tax brokers upon their annual receipts, notwithstanding they pay a license tax for the privilege of carrying on that business. A corporation may be required to pay a special exicse tax in addition to a license tax without being subjected to double taxation. A tax on ice houses or agencies of a certain sum where not more than five wagons are

> used for selling or delivery purposes, with an additional tax of ten dollars for each additional wagon, is not double taxation."

The second observation that "power to tax a business does not include power to levy a tax upon the particular elements or operations which go to make up the business" does not seem to be fully supported by the cases cited in support thereof. The cases referred to, with the exception of the Tennessee case of *Shelton* v. *Silverfield,* 104 Tenn. 67; 56 S. W. 1023, involve tax ordinances enacted by municipal corporations rather than the enactments of state legislatures. In that connection it seems that the rules of the courts of Kentucky and Tennessee (compare *City of Newport* v. *Fitzer,* 131 Ky. 554; 115 S. W. 742; and *Gulf Refining Company* v. *Chattanooga,* 136 Tenn. 305; 190 S. W. 623) are a more strict interpretation against the existence of more than one tax touching the same subject matter than is the rule of more general application throughout the other states.

In discussing so-called double taxation the inquiry is, in reality, not one of legislative power but of legislative intent. No constitutional questions, other than indirectly the equal protection of the laws, are involved.

In the case of *Shaffer* v. *Carter,* 252 U. S. 37, 58, it was said:

> "Nor, even if the effect of this is akin to double taxation, can it be regarded as obnoxious to the Federal Constitution for that reason, since it is settled that nothing in that instrument or in the 14th Amendment prevents the states from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions. *St. Louis*

*Southwestern R. Co.* v. *Arkansas,* 235 U. S. 350, 367, 368."

And, in the case of *Carley & Hamilton* v. *Snook,* 281 U. S. 66, 72, it was said:

> "The objection that the appellants should not be required to pay the challenged fees because they are already paying the city license tax is but the familiar one, often rejected, that a state may not, by different statutes, impose two taxes upon the same subject matter, although, concededly, the total tax, if imposed by a single taxing statute, would not transgress the due process clause. See *Swiss Oil Corp.* v. *Shanks,* 273 U. S. 407, 413; *St. Louis, Southwestern R. Co.* v. *Arkansas,* 235 U. S. 350, 367, 368; *Shaffer* v. *Carter,* 252 U. S. 37, 58; *Ft. Smith Lumber Co.* v. *Arkansas,* 251 U. S. 532, 533."

So far as legislative intent is concerned, where that intent is clear, the majority of the courts do not hesitate to sustain the several taxes even though they may, in instances, be double or multiple. See *Equitable Life Assurance Society* v. *Hart,* 55 Mont. 76, 173 Pac. 1062, wherein it was held that a license to carry on a particular business, to be secured and the fees to be paid before commencing the business, and a license fee of one per cent on the net income of every corporation engaged in the business, did not constitute double taxation.

In *Provo City* v. *Provo Meat and Packing Company,* 49 Utah 528, 165 Pac. 477, an occupation tax was imposed on merchants, based on the stock of merchandise, which was divided into twenty-two classes ranging from $200, the lowest, to over $500,000, the tax ranging from $10.00 to $200.00. Another tax was imposed on selling fresh

meats, ranging from $15.00 to $35.00. The court held, point 5 of the syllabus:

> "Under Comp. Laws 1907, sec. 206, as to regulation and taxation of merchants, it is within the power of a city to impose a general merchant's license tax upon one who is engaged in a general merchandising business, including the sale of meats, and further to impose a license tax upon his business of selling meat."

The case of *Viquesney* v. *Kansas City,* 305 Mo. 488, 266 S. W. 700, is a striking example of the imposition of multiple taxes without violating the rule of double taxation. There the defendant paid a tax of $15.00 per year on his garage under the terms of an ordinance providing for the restriction and licensing of various occupations. He paid also a tax of $10.00 on his gasoline curb. He paid an ad valorem tax of $1.77 on his property. He challenged, as constituting double taxation, the validity of another ordinance which required every person engaged in the business of selling gasoline, benzine or naptha to procure a license therefor, and to pay for the license the sum of $1.00, and thereafter one cent for each gallon of gasoline, sold. The court held:

> "The present tax being a revenue measure, it must conform to Section 3, Article X, of the Constitution, providing that the tax must be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. There is nothing in the record to show that this tax offends against the requirement of uniformity, or that it is in conflict with the equal protection clause of the 14th Amendment to the Federal Constitution." *(Viquesney* v. *Kansas City,* 305 Mo. 488, 498, 266 S. W. 700, 703).

There seems to be no decision of the Supreme Court of Appeals of West Virginia discussing the supposed subject of double taxation in connection with license taxes. The case of *Harvey Coal & Coke Company* v. *Dillon,* 59 W. Va. 605, 633, involved the constitutionality of a tax upon leaseholds upon real estate separate and apart from the taxation of the real estate, in which it was asserted that the taxation of the leaseholds, inasmuch as they were but a part of the land, constituted double taxation, but this contention was rejected, the Supreme Court of Appeals of West Virginia determining that the leasehold was a separate taxable property. This case probably goes no further than to show the liberality of the Supreme Court of Appeals of West Virginia in dealing with such questions.

In the case at bar the gasoline tax and the store tax are obviously different taxes, the one upon the sale of a particular article of merchandise, the other upon the right to engage in the business of selling merchandise of any character whatever; the two taxes are for different purposes, the gasoline tax for the construction and maintenance of public highways and the store tax for the support and maintenance of schools.

The identical assertion of double taxation was made in the case of *Midwestern Petroleum Corporation* v. *State Board of Tax Commissioners,* (Ind., 1933) 187 N. E. 882, 889. The Indiana gasoline tax, in addition to the gallonage tax, required a dealer's license of $1.00 [See Burns Annotated Indiana Statutes, Watson's Revision (Bobbs-Merrill) Vol. 4, Supplement of 1929, Section 10187.1, page 684; Acts of Indiana 1929, p. 68, approved March 7, 1929] corresponding to the $1.00 license tax on filling stations and $5.00 license tax on bulk plants under the provisions of Section 2, Article

14, Chapter 11 of the Code of West Virginia imposing the West Virginia gasoline tax. The Supreme Court of Indiana observed:

> "Appellant urges that the fact that it is subject to a gasoline dealers' license tax, and is required to collect the gasoline tax upon sale of that product, and is subject to the payment of oil inspection fees, is persuasive to the proposition that it will not be included by implication in the terms of the statute, but must be excluded therefrom. But we find no necessity for an inclusion by implication, since it seems to us that it is included by express terms. The fact that its business is confined almost exclusively to dealing in petroleum products is a result of its own choice. It is well known that grocery stores, and others engaged principally in some other line of business, purvey petroleum products, and nothing but free choice prevents appellant from dealing in general merchandise in addition to the business in which it is now engaged."

Not only, so far as the store license is concerned, might appellee sell other merchandise than gasoline if it should see fit to do so, but, in fact, appellee does sell other articles of merchandise not specifically taxed, particularly, motor oils and tires, tubes, batteries and automobile accessories generally.

### Governmental Policy in Taxation

Appellant in the answer (R. 97-98) says that the act in question is a tax measure, but denies that the act has nothing to do with the exercise of the police power of the state. By the police power in this connection is,

of course, meant the police power in its broadest sense in reflecting the expression of governmental policy for the general welfare of the state. The appellant avers that it is the policy of the State of West Virginia to encourage individual business enterprise rather than to encourage the citizens to be mere employees of a limited number of giant commercial enterprises. That proper governmental policy may be effected by a proper exercise of the taxing power has been recognized in many decisions. See *Fort Smith Lumber Company* v *Arkansas,* 251 U. S. 232, 234; *Quang Wing* v. *Kirkendall,* 223 U. S. 59, 63; *Alaska Fish Company* v. *Smith,* 255 U. S. 44, 48; *A. Magnano Company* v. *Hamilton,* 291 U. S. ---, 78 L. Ed. (Adv.) 712, 715; *Midwestern Petroleum Corp.* v. *State Board of Tax Commissioners,* (Ind.) 187 N. E. 882, 887-8.

## CONCLUSION

In conclusion, it is respectfully submitted:

(1) That, within the meaning of the West Virginia chain store tax statute, the filling stations and bulk plants of appellee, including agency stations, are stores.

(2) That the statute rests upon a classification, the basis of which has been frequently approved by the Court, and that the rate of tax to be laid upon the basis of an approved classification presents a legislative and not a judicial question, and that the act is not violative of the Fourteenth Amendment or any other provision of the Federal Constitution.

(3) That the act does not violate any provisions of the Constitution of the State of West Virginia.

(4) That appellant properly required appellee to pay the taxes here involved. And

(5) That the judgment appealed from should be reversed.

Respectfully submitted,

HOMER A. HOLT,
*Attorney General,*

R. DENNIS STEED,
*Assistant Attorney General,*

WM. HOLT WOODDELL,
*Assistant Attorney General.*
*Counsel for Appellant.*